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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

J. L. SIMMONS COMPANY, INC.,

Petitioner

v.

LOCAL 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, JOHN FOREMAN, BUSINESS AGENT, AND HAROLD STOLLEY, STEWARD

AND

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANLEY R. STRAUSS
PAUL G. GEBHARD
1750 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

ARTHUR B. SMITH, JR.
39 South La Salle Street
Chicago, Illinois 60603
Attorneys for Petitioner

Of Counsel:
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
1750 Pennsylvania Avenue, N. W.
Washington, D. C. 20006
202—298-6445

La Salle Street Press—Chicago 60610

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, J. L. Simmons Company, Inc., petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit remanding an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, is reproduced in the Appendix to this petition at App. 1a-18a. The decision and order of the Board, including the Trial Examiner's Decision, are reported at 178 NLRB No. 54, and are set forth in the Appendix at App. 19a-60a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1971 (App. 1a). On June 29, 1971, the Chief Justice signed an order extending the time for filing a Petition for Certiorari to and including September 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the "right to control" doctrine—that union activity is unlawful if exerted against an employer who lacks control over the matter in dispute—must be abandoned by the National Labor Relations Board.

2. Whether a union may lawfully exert pressure on its members' employer where the objective is one of work preservation, notwithstanding that (a) the union's agreement with the employer contains no work preservation clause, and (b) the employer is powerless to meet the union's demands unless he ceases to do business with a supplier who is not involved in the dispute.

3. Whether the decision of this Court in *National Woodwork Manufacturers Assn.* v. *NLRB,* 386 U.S. 612 (1967), should be overturned.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

> SEC. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in

the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing:

• • • •

STATEMENT OF THE CASE

The General Counsel of the Board issued a complaint alleging that Local 742, United Brotherhood of Carpenters and Joiners of America, John Foreman, Business Agent, and Harold Stolley, Steward (hereinafter collectively called "the Union"), had engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i) and (ii) (B) of the Act. The complaint charged that the Union had threatened and had engaged in refusals to handle premachined, plastic-faced and edged doors with the objective of causing J. L. Simmons Company, Inc. (hereinafter called "the Company"), to cease doing business with Anderson Wood Products Company of Louisville, Kentucky (hereinafter called "Anderson"), the manufacturer and supplier of the doors, and with the Decatur and Macon County Hospital (hereinafter called "the Hospital"). The Hospital was engaged in a construction project located in Decatur, Illinois, called Additions and Alterations to Decatur and Macon County Hospital (hereinafter called "the Project"). The Company had been retained as general contractor for this Project. The essence of the complaint was that the Union, by refusing to handle the premachined, plastic-faced and edged doors, used coercive and unlawful secondary pressure in an attempt to require that the work of machining the doors be performed on the job site, rather than to allow the installation of doors which had been premachined

at Anderson's factory, as specified and required by the Hospital and its architect.

Following a hearing, a Board Trial Examiner issued a Decision which recommended dismissal of the complaint. Thereafter, the Board issued a Decision and Order which reversed the Trial Examiner's Decision and substantially all of the Trial Examiner's conclusions and in which it held that the Union had engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

The Court of Appeals remanded this case to the Board for a new decision as to whether the Union had violated Section 8(b)(4)(i) and (ii)(B) of the Act. The jurisdiction of the Court of Appeals was predicated on Sections 10(e) and 10(f) of the Act.

A. The Facts

1. *The Collective Bargaining Relationship*

At all times pertinent to the instant case, the Company was signatory to an agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (hereinafter called "the International Union"). In the Decatur, Illinois, area the Company was, pursuant to its agreement with the International Union, bound to observe the agreement effective between the Union and the Decatur Contractors Association, Inc. Neither the latter agreement nor the Company's agreement with the International Union contained a work preservation clause prohibiting the Company's use of prefabricated building products.

2. *The Decatur and Macon County Hospital Project*

In 1966, the Hospital requested that contractors submit bids for the construction of additions and alterations to the Hospital. The Company was the successful bidder and entered into an agreement with the Hospital for performing the work on the Project in accordance with specifications

supplied by Dane D. Morgan and Associates, Architects. The agreement between the Company and the Hospital required the Company to install, in accordance with the architect's specifications,[1] premachined plastic-faced and edged doors, guaranteed for the life of the building in which they were to be installed. Pursuant to its agreement with the Hospital, the Company ordered such premachined doors from Anderson.

The decision to require the Company to install premachined doors in the Project was made by the Hospital and the architect to insure that the Project's doors would be guaranteed for the life of the installation. In order to obtain a door with a lifetime guarantee from Anderson, Anderson insists that any cutting, routing, mortising, bevelling, or trimming work be done in its plant. Even if a skilled job site carpenter machines and prepares the doors, it is not possible to obtain a lifetime guarantee if any cutting, rout-

[1] In pertinent part, the architect's specifications (Section 35) provided:

"PLASTIC FACED and WOOD DOORS

1. SCOPE

a. Unless otherwise scheduled, all doors shall be Solid Wood Core Doors with Laminated Plastic Finish as herein specified and shall be identified herein as Plastic Faced Doors.

b. See Method of Bidding. Alternates shall be taken to furnish, install, and finish Solid Wood Core Doors with Flush Wood Veneer Facings, job finished, as herein specified in lieu of Plastic Faced Doors. Flush wood veneered doors are identified herein as Wood Doors.

c. Each door to be factory fit and beveled to net opening sizes and shall be factory machined to satisfy the entire hardware schedule, except for surface applied hardware which does not require shop preparation. No cutting, routing, trimming, or mortising shall be permitted after doors leave factory and doors requiring modifications shall be returned to the factory.

* * *

2. DOORS

* * *

b. Each door to be guaranteed for the life of the building."

The Hospital, as allowed by its agreement with Company, and with the architect's approval, opted for premachined, plastic-faced doors rather than premachined doors with wood veneer facings.

ing, mortising, bevelling, or trimming work is performed on the job site, and the lifetime guarantee would no longer apply to any premachined doors that were cut, routed, mortised, or bevelled by carpenters on the job site.

3. *The Continuing Refusals to Install Premachined, Plastic-Faced and Edged Doors: December 1, 1967—February 1, 1968*

During November, 1967, approximately 80 of the premachined plastic-faced and edged doors ordered by the Company from Anderson arrived at the Project site. On December 1, 1967, John Foreman, the Union's business agent, told Robert Neal, Vice President and Manager of the Decatur Building Division of the Company, that the premachined, plastic-faced and edged doors would not be hung by members of the Union. After being apprised of the fact that the Company was bound by the terms of its contract with the Hospital to purchase and install premachined, plastic-faced and edged doors, Foreman claimed that the routing, boring, and mortising work on the doors belonged to the job site carpenters and threatened that the Union's carpenters would not hang the doors.

On December 11, 1967, Gordon L. Dyslin, a job superintendent for the Company, requested Harry Stolley, the Union steward at the Project site, to hang the premachined, plastic-faced and edged doors. Stolley refused to do so. Additional specific instances of refusals by the Union to install the doors occurred on January 30 and 31, 1968. It was not until February 1, 1968, when Foreman, in response to a letter from Neal dated January 31, 1968, finally informed the Company by letter that the Union would grant its members the right to install the doors.

During the period of time it was refusing to install the premachined doors, the Union was also demanding that the Company pay premium wage rates, in addition to the rates

established in the collective bargaining agreement governing the Company and the Union, as the condition for its granting its members the right to install the doors.

B. The Trial Examiner's Decision

Finding that the Union had engaged in unlawful conduct within the meaning of Section 8(b)(4)(i) and (ii) of the Act, but refusing to apply the "right to control" test,[2] the Board's Trial Examiner concluded that the Union's pressure on the Company, while constituting prohibited "means," was for a legitimate "object" and therefore constituted primary, protected activity which did not violate Section 8(b)(4)(B) of the Act (App. 29a-60a).

C. The Board's Decision and Order

The Board reversed the Trial Examiner, and held that the Union had violated Section 8(b)(4)(B) of the Act. Applying the "right to control" test, the Board reasoned that because the Hospital had required, by means of the architect's specification, that premachined plastic-faced and edged doors be installed in the Project, the Company could not satisfy the Union's demands except by ceasing to do business with the Hospital and with Anderson (App. 19a-24a). Concluding, therefore, that the Union's actions were "secondary," the Board ordered the Union, *inter alia,* to cease and desist from engaging in the unlawful pressures it directed against the Company, and from refusing to handle the premachined, plastic-faced and edged doors (App. 24a-26a).

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[2] Under the "right to control" test a union engages in unlawful secondary activity, and therefore violates Section 8(b)(4)(B) of the Act, when it "demands that a contractor do something he is powerless to do except by ceasing to do business with somebody not involved in the dispute." See *Ohio Valley Carpenters District Council* v. *N.L.R.B.*, 339 F.2d 142, 145 (6th Cir. 1964). Stated otherwise, the test treats as decisive the inability on the part of an employer to make a work assignment the union is demanding.

D. The Decision and Judgment of the Court of Appeals

The Court of Appeals ruled that the "right to control" test was invalid when applied as a *per se* rule, and as such, "must be finally abandoned" (App. 17a). It viewed the "right to control" test as irreconcilable with the primary-secondary analysis of this Court's opinion in *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612 (1967), and decided that its invalidity was so pervasive that even where, as here, the employer and the union were not governed by a work preservation clause the test could not be utilized to determine whether a union has violated Section 8(b)(4)(B) of the Act (App. 8a-17a). The Court of Appeals remanded the case to the Board with the direction that the Union's objective be considered in the light of all the surrounding circumstances, including, "if it throws any light on the union's objective," the Company's lack of "control" (App. 17a).

In concurring opinions, Circuit Judge MacKinnon emphasized that the court's opinion was not to be construed as indicating the court's view on the inferences to be drawn from the absence of a work preservation clause, and District Judge Smith noted his disagreement with the fact that the court, rather than the Board, had acted initially to interpret the parties' labor agreement (App. 17a-18a).

REASONS FOR GRANTING THE WRIT

1. *The Decision Below Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.*

In *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U.S. 612 (1967), this Court was faced with a situation in which the employer against whom a union struck had a *choice* either to fabricate doors on a job site or purchase prefabricated doors. The resultant strike, when the employer selected the latter alternative, was held by this Court not to violate Section 8(b)(4)(B) of the National

Labor Relations Act. This Court expressly did not decide, however, whether a similar result would have been reached had the employer no power to determine whether to use prefabricated doors, 386 U.S. at 616, n. 3.

This case presents directly the question which this Court left undecided in *National Woodwork*. The question is one which is vitally important in the interpretation and administration of the Act. Moreover, the absence of any decision by this Court has resulted in a severe dislocation in the administration of our national labor law.

The court below has made it clear, in both this case and others,[3] that it will not accept the Board's right to control test. The Board, on the other hand, has made it equally clear that it will continue to apply that test until this Court orders otherwise. This confrontation will lead to disruption and strife on construction jobs throughout the country. It is also illustrative of a continuing conflict between the Board and the court below which has frequently arisen in recent years. One such situation was before this Court in *H. K. Porter Company* v. *NLRB*, 397 U.S. 99 (1970). Another conflict exists as to the appropriate remedy for violations of Section 8(a)(5) of the Act. See *Tiidee Products, Inc.* v. *International Union of Electrical, Radio and Machine Workers*, 426 F.2d 1243 (D.C. Cir. 1970).[4] There also is a substantial conflict on related questions regarding the secondary boycott provisions of the Act. *Carpet Layers* v. *NLRB*, 429 F.2d 747 (D.C. Cir. 1970).[5] To the extent that

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[3] See, *e.g.*, *Local 636 Plumbers* v. *NLRB*, 430 F.2d 906 (D.C. Cir. 1970).

[4] *Tiidee Products, Inc. (I)*, 174 NLRB No. 103 (1969), *enf'd sub. nom.*, 426 F.2d 1243 (D.C. Cir. 1970), *rehearing denied*,—F2d —, 75 LRRM 2350 (D.C. Cir. 1970), *cert. denied*,—U.S.—, 75 LRRM 2752 (1970); *Tiidee Products, Inc. (II)*, 176 NLRB No. 133 (1969), *remanded*, 440 F.2d 298 (D.C. Cir. 1970).

[5] See *Carpet Layers Local 419*, 176 NLRB No. 120 (1969), *remanded* 429 F.2d 747 (D.C. Cir. 1970), *decision on remand*, 190 NLRB No. 28 (1971).

these conflicts continue to exist, they seriously impair uniform and speedy administration of the federal labor law.

A remand of the present case to the Board would thus serve no useful purpose and would operate to the substantial detriment of petitioner. If the Board refuses to abandon the right to control test until this Court "explicitly decides to the contrary," what need is there for a remand? There will be merely a repetition of the unhappy history of *Porter*.[6] Such expensive and time-consuming litigation and "unnecessary duplication of proceedings" is anathema to the purpose of judicial review of securing "a just result with a minimum of technical requirements." *United Automobile Workers* v. *Scofield*, 382 U.S. 205, 212 (1965). The instant matter is now in an appropriate posture for this Court to decide the question left unanswered in *National Woodwork* and to remove the conflict that now exists between the Board and the court below.

2. *The Decision Below Resolves An Important Federal Question In a Manner Not in Accord With Applicable Decisions of This Court.*

Notwithstanding this Court's express statement that the right to control doctrine was not before it in *National Woodwork*, the court below construes that decision to reject the right to control test. The Board has correctly categorized this result as "anomalous." *Local 636 Plumbers*, 177 NLRB No. 14 (1969).

There are far-reaching ramifications to the decision below. *First*, it fundamentally questions the Board's use of analytical tools in delineating what the court below recog-

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[6] *H. K. Porter Company, Inc.*, 153 NLRB 1370 (1965) *enf'd. sub. nom.*, 363 F.2d 272 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 851 (1966), *remanded on motion for reconsideration*, 389 F.2d 295 (D.C. Cir. 1967), *supplemental decision on remand*, 172 NLRB No. 72 (1968), *enf'd* 414 F.2d 1123 (D.C. Cir. 1969), *reversed and remanded*, 397 U.S. 99 (1970).

nized to be "one of the most important, but one of the most elusive, distinctions embodied in our labor law." The Board is surely permitted to utilize its accumulated experience in the complex area here involved. Such rules to guide determinations of secondary activity have, in fact, been widely accepted in the past. The Board has, for example, successfully established a test for determining whether picketing at a common situs is primary or secondary. *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950). A "work relation" test is used to determine the object of picketing a gate reserved for contractors on the premises of an industrial plant which is involved in a labor dispute. *Local 761, Electrical Workers* v. *NLRB*, 366 U.S. 667 (1961). Similarly the right to control test is used as an analytical tool by the Board in ascertaining whether an employer is a neutral party in a dispute, and thereby in determining whether union activity directed at the employer has a prohibited objective. Under this test, a neutral employer is one who has no power or control over the decision to use a product against which a union has directed its boycott, and therefore lacks power or control over work assignments and tasks which the boycott pressure is intended to achieve for union members. Thus, pressure directed against such a neutral employer, which is intended to force a change in the type of product used or in the assignment of work, is deemed to be prohibited secondary activity.

Second, the right to control test, as the Board observed in *Local 636*, conforms "with the Congressional intent in proscribing secondary boycotts." The Board there noted that the test had received the approval of a number of courts of appeal and quoted in particular the Sixth Circuit in *Ohio Valley Carpenters District Council, U. B. of C.* v. *NLRB*, 339 F.2d 142, 145 (6th Cir. 1964):

> "The basic criterion is, as the statute (Section 8(b)(4)) specifically provides, the object, or objects, of the union action. So the problem is: What was the object? The

> Board has held several times that, if a union demands that a contractor do something he is powerless to do except by ceasing to do business with somebody not involved in the dispute, it is manifest that an object of a union is to induce this cessation of business. The courts to which this problem has come have agreed with the holdings.
>
> "We think this is rational and proper reasoning."

The right to control test confines picketing to the person who has the power to do something, short of ceasing to do business with another, to meet the purported objective of picketing. Indeed, in *NLRB* v. *Denver Building and Construction Trades Council,* 341 U.S. 675 (1951), as the Board recently reiterated,[7] the Court held that forcing union employers to cease doing business with non-union contractors was unlawful secondary activity where no ability to control policy was shown. The mere fact that a party who lacks control may, nevertheless, have an interest in the outcome of a labor dispute, as is admittedly the case here, does not alter the situation. As the Board observed in a related situation,[8] such economic interest does not require a conclusion that the employer involved is not a neutral for the purpose of Section 8(b)(4)(B) of the Act where he is independent of the party who has the power to rectify the source of the union's discontent.

Third, in the present case, in contrast to *National Woodwork,* there was no work preservation agreement which prohibited the Company from using and installing prefabricated doors. The decision below is the first case in which pressure on a contractor has been sanctioned notwithstanding the absence of a specific work preservation agreement to which the Union was seeking compliance. There are several important aspects to this distinction. The Court below considered the contract here as though it contained a work preservation agreement entitled to preference over the

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[7] See *Carpet Layers Local 419,* 190 NLRB No. 28 (1971).

[8] *Id.*

Company's contract with the Hospital. See *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99 (1970), where a similar attempt to require parties to abide by terms of a collective bargaining agreement to which they had never agreed were struck down by this Court. Moreover, the Court below was also forced to disregard the underlying premise of its own prior decisions which had condemned the right to control test. The Court relied principally on *Local 636, Plumbers* v. *NLRB,* 430 F.2d 906 (D.C. Cir. 1970), which was concerned primarily with preventing a contractor who was a party to a work preservation agreement from violating his contractual obligation to a union by colluding with another to require installation of prefabricated products. In *Local 636,* the contractor had "created its own predicament" and the action approved by the Board would have had the effect, in the court's opinion, of encouraging employers "to undermine their collective bargaining agreements by actively soliciting contracts whose very terms called for conduct violative of those trade agreements . . ." 430 F.2d at 908-909. Here, the evil to which the Court addressed itself in *Local 636*—the undermining of a collective bargaining agreement through fraud and collusion—is simply not present. The Company, by complying with its contract with the Hospital, did not undermine any obligation to preserve work for Union members. On the other hand, the Union, by reaching out for work to which it had no contractual claim, forced the Company, "a neutral with respect to the assignment of work," to breach its contract with and thus cease doing business with the Hospital. Clearly, *National Woodwork* sanctions no such result.

3. *The Decision Below is In Conflict With the Decisions of Other Courts of Appeal On the Same Question.*

The "right to control" test originated with the Board which has applied the test uniformly and without excep-

tion.[9] Prior to 1968, the Second, Sixth, Seventh, and District of Columbia Circuits had sanctioned the test, holding that it could be the basis for a finding that product boycotts violated Section 8(b)(4)(B) of the Act.[10] Thereafter, the Third, Eighth, Ninth, and District of Columbia Circuits issued decisions rejecting the controlling effect of the test in the context of collective bargaining relationships governed by work preservation agreements.[11]

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[9] *Local 1066, International Longshoremen's Ass'n., et al., 137* NLRB 45 (1962); *Local 5, Plumbers,* et al., 137 NLRB 828 (1962) enf'd. 116 U.S. App. D.C. 100, 321 F.2d 366 (D.C. Cir.), *cert. denied,* 375 U.S. 921 (1963); *International Longshoremen's Association (Board of Harbor Commissioners),* 137 NLRB 1178 (1962), *enf'd.* 331, F.2d 712 (3rd Cir., 1964); *Metropolitan District Council of Phila., (National Woodwork),* 149 NLRB 646 (1964), *enf'd.* as to the right to control issue, *National Woodwork Manufacturers' Ass'n.* v. *NLRB,* 354 F.2d 594 (7th Cir., 1965); *Pipe Fitters Local No. 120 (MCA of Cleveland, Inc., Spohn Corp., Wrightco, Inc.),* 168 NLRB 991 (1967): *United Ass'n. Pipe Fitters Local 455 (American Boiler Manufacturers) (3-M Incident),* 154 NLRB 285 (1965), *enf'd. American Boiler Manufacturers Association* v. *NLRB,* 366 F.2d 815 (8th Cir. 1966), *reaffirmed* as to the *3-M Incident,* 404 F.2d 547 (8th Cir. 1968), *cert. denied,* 398 U.S. 960 (1970); *Local 636, Plumbers (Mechanical Contractors Association of Detroit, Inc.),* 177 NLRB No. 14 (1969), *remanded,*—U.S. App. D.C.—430 F.2d 906 (D.C. Cir. 1970); *Local 337, Carpenters (J. B. Willer Co., Inc.),* 179 NLRB No. 133 (1969); *Local 8, Bricklayers (California Concrete Systems),* 180 NLRB No. 3 (1969), *modified sub nom*—F.2d—77 LRRM 3023 (9th Cir. 1971); *Enterprise Ass'n. etc.,* 183 NLRB No. 61 (1970).

[10] *Local 5, Plumbers* v. *NLRB,* 116 U.S. App. D.C. 100, 321 F.2d 366 (D.C. Cir.), *cert. denied* 375 U.S. 921 (1963); *Local No. 636, United Ass'n. of Journeymen* v. *NLRB,* 108 U.S. App. D.C. 24, 278 F.2d 858 (D.C. Cir. 1960); *NLRB* v. *Enterprise Ass'n.* et al., 285 F.2d 642 (2nd Cir. 1960); *Ohio Valley Carpenters District Council* v. *NLRB,* 339 F.2d 142 (6th Cir. 1964); *NLRB* v. *ILA, Local 1694,* 331 F.2d 712 (3rd Cir. 1964); *National Woodwork Manufacturers Ass'n.* v. *NLRB,* 354 F.2d 594 (7th Cir. 1965), reversed on another ground, 386 U.S. 612 (1967); *NLRB* v. *Local 157, Plumbers,* 369 F.2d 388 (7th Cir. 1966).

[11] *NLRB* v. *Local 164, IBEW,* 388 F.2d 105 (3rd Cir. 1968); *American Boiler Manufacturers' Association* v. *NLRB,* 404 F.2d 556 (8th Cir. 1968); *Local 636, Plumbers* v. *NLRB,* 430 F.2d 906 (D.C. Cir. 1970); *Western Concrete Products, Inc.* v. *NLRB,*— F.2d—, 77 LRRM 3023 (9th Cir. 1971): See also *Beacon Castle Square Building Corp.* v. *NLRB,* 406 F.2d 188, 192 n. 10 (1st Cir. 1969) (dictum).

In 1969, in the *Detroit Mechanical Contractors* case.[12] the Board took cognizance of those courts of appeals decisions which were critical of the Board's reliance on. and application of, the "right to control" test, but announced that "until the Supreme Court decides to the contrary", it would continue to apply the test as it had done in the past.[13] The Board's announced adherence to the "control" test is reflected in the instant case.

The uncertain legality of the "right to control" test. created by the conflict in the courts of appeals and also by the position of the Board, is intensified by the decision below. which, for the first time, rejects the controlling effect of the test in the context of the non-existence of a work preservation clause.[14] The latter decision, therefore, conflicts not only with the pre-*National Woodwork* decisions of the courts of appeals, but also with the post-1968 decisions of such courts, which have held only that the Board is precluded from affording the "right to control" test decisive significance or controlling weight.[15]

The presently existing uncertainty as to the continued vitality and weight of the "right to control" test necessarily

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[12] 177 NLRB No. 14.

[13] The D.C. Circuit reversed the Board's decision in the *Detroit* case. *Local 636, Plumbers* v. *N.L.R.B.*, 430 F.2d 906 (D.C. Cir. 1970). On remand. the Board accepted the ruling. but only in the "circumstances" of that case, 189 NLRB No. 99 (1971).

[14] Commentators have criticized the right to control test only in the context of a collective bargaining relationship governed by a work preservation clause. See Comment, Secondary Boycotts and Work Preservation, 77 Yale L.J. 1401, 1415-1417 (1968); Feldacker. Subcontracting Restrictions and the Scope of Sections 8(b)(4)(A) and (B) and 8(e) of the National Labor Relations Act. 17 Lab. L.J. 170, 182-185 (1966); Lesnick. Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e). 113 U. Pa. L. Rev. 1000, 1038 (1965); Cf., the Supreme Court. 1966 Term. 81 Harv. L. Rev. 110, 251 (1967).

[15] *American Boiler Manufacturers' Association* v. *NLRB*. 404 F.2d 556, at 562 (8th Cir. 1968); *NLRB* v. *Local 164. IBEW*. 388 F.2d 105, at 109 (3rd Cir. 1968); *Beacon Castle Square Building Corp.* v. *NLRB*, 406 F.2d 188, at 192. n. 10 (1st Cir. 1969); *Western Concrete Products Inc.* v. *NLRB*,—F.2d—, 77 LRRM 3023. at 3026 (9th Cir. 1971).

encourages, we submit, not only coercive tactics by unions intended to forestall the use of specific products, but also increased union demands for the payment of premium wages as a condition for the handling of prefabricated products. Such forces necessarily have the effect of retarding technological progress, of exacerbating the uneconomic practices existing in the construction industry today, and of fueling the inflationary pressures which, some six months prior to the institution of the 90-day wage-price "freeze" for the entire economy,[16] impelled the President to issue an Executive Order[17] to control wages and prices in the construction industry.

In sum, the present uncertainty as to the "right to control" test, conjoined with an increased national utilization of prefabricated building products, modular housing units, and prefabricated building components,[18] raises a vitally important question of federal law. In view of the Board's position, it is clear that the question must be resolved by this Court. The resolution, we respectfully urge, should be undertaken in this case.

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[16] Executive Order 11615, promulgated August 15, 1971.

[17] Executive Order 11588, promulgated March 29, 1971.

[18] E.g. Operation Breakthrough, the Department of Housing and Urban Development's answer to the nation's acute housing crisis, is a program which seeks ways to mass-produce and mass-market housing by utilizing prefabricated building components and precast concrete slabs made in standardized shapes and sizes. All the 22 designs chosen for use in Operation Breakthrough, after a national competition involving 230 entries are based on industrialized systems of prefabricated or factory built components. See New York Times, Feb. 28, 1970, p. 31 col. 1; New York Times, May 20, 1971, p. 1 col 3.

4. *The Decision Below Presents This Court With an Appropriate Vehicle to Overturn* National Woodwork

It is now a proper time to re-examine *National Woodwork*. In *National Woodwork* the majority of this Court upheld, by a five to four vote, the use of a product boycott, even though conceding that the literal language of Section 8(b)(4) prohibited such boycotts. The Court based its conclusion upon the theory that Section 8(b)(4) does not outlaw product boycotts because it is primarily designed to preserve work jurisdiction. In reaching this conclusion, and thus overruling *Joliet Contractors Association* v. *NLRB*, 202 F.2d 606 (7th Cir.) *cert. denied* 346 U.S. 825 (1953), the Court also overruled the essential rationale of *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951). *Denver* held that if a boycott has as one of its objects the forcing of one employer to refrain from doing business with another employer, the fact that the boycott might have another object (such as work preservation) is irrelevant.

It is now proper in the context of reviewing the decision of the court below for this Court to reconsider its decision in *National Woodwork*. Until *National Woodwork*, the courts and the National Labor Relations Board understood that by enacting Section 8(b)(4)(B) and Section 8(e) of the Act, Congress had intended to ban product boycotts as well as other forms of secondary boycott activity. We respectfully submit that the decision of this Court in *National Woodwork* not only misinterpreted the clear product boycott ban contained in the Act, but has in practice so extended the ability of unions to engage in disruptive boycott activities that, in effect, it has repealed Section 8(b)(4) of the Act.

The economic impact of *National Woodwork* has been catastrophic. By this decision, and under decisions such as this one that are predicated on *National Woodwork,* unions have been given a weapon by which they can ban all prefabricated material from a job site, and require resort to costly and economic practices of fabrication on the job site. Not only will this add millions of dollars to construction costs, thus injuring the consuming public, but it will also take work away from employees in other industries who are employed in the prefabrication of materials to be used on construction jobs.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY R. STRAUSS
PAUL G. GEBHARD
1750 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

ARTHUR B. SMITH, JR.
39 South La Salle Street
Chicago, Illinois 60603
Attorneys for Petitioner

Of Counsel:
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
1750 Pennsylvania Avenue, N.W.
Washington, D. C. 20006
202—298-6445

September 3, 1971

APPENDIX

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,486

LOCAL NO. 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, JOHN FOREMAN, Business Agent, and HAROLD STOLLEY, Steward, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
J. L. SIMMONS COMPANY, INC., INTERVENOR

No. 24,346

J. L. SIMMONS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Decided April 6, 1971 { JUDGMENT ENTERED THIS DATE

Mr. Bernard M. Mamet for petitioner in No. 23,486.

Mr. Paul G. Gebhard, with whom *Mr. Arthur B. Smith, Jr.* was on the brief, for petitioner in No. 24,346 and intervenor in No. 23,486.

Mr. Frank Itkin, Attorney, National Labor Relations Board, of the bar of the Supreme Court of New Jersey, *pro hac vice*, by special leave of court, for respondent. *Messrs. Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Mrs. Abigail Cooley Baskir*, Attorney, National Labor Relations Board, were on the brief for respondent. *Mr. Charles R. Both*, Attorney, National Labor Relations Board, also entered an appearance for respondent.

Before WRIGHT and MACKINNON, *Circuit Judges*, and SMITH,* *Chief Judge*, United States District Court for the District of Montana.

Opinion filed by WRIGHT, *Circuit Judge*.

Concurring opinion filed by MACKINNON, *Circuit Judge*.

Concurring opinion filed by SMITH, *District Judge*.

WRIGHT, *Circuit Judge*: These cases concern one of the most important, but one of the most elusive, distinctions embedded in our labor law—the distinction between "primary" and "secondary" union activity under Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(B)(1964). J. L. Simmons Company filed charges against Local 742, alleging that the carpenters had violated that section in refusing to install prefabricated doors manufactured by another employer. The trial examiner dismissed the charges. He found that the union and Simmons were the primary parties to a dispute over work preservation and concluded that the union's pressure

* Sitting by designation pursuant to 28 U.S.C. § 292(c) (1964).

on Simmons was therefore permissible. However, the Board reversed, finding that Simmons was a mere "neutral" with respect to the hanging of prefabricated doors and that the union's actions thus amounted to a forbidden secondary boycott.

The primary-secondary distinction, though originating in the common law, has never taken on very clear dimensions, and the Board has attempted to bring order out of the chaos by formulating determinate rules to guide its application. One of those rules—the "right to control" test—makes union activity secondary *per se* if the members' employer, subjected to pressure, lacks immediate "control" over the matter in dispute. That test was applied by the Board to this case, and its validity is at issue on appeal.[1]

This court and other courts have recently begun to criticize the "right to control" test. Guided by the Supreme Court's articulation of the primary-secondary distinction,

[1] Two other issues were raised by the union and J. L. Simmons Company. First, the union argues that there is not substantial evidence to support the Board's finding that Simmons lacked "control" to begin with—even if the "right to control" test is valid—and the test therefore should not have been applied to the facts of this case. The problem of what constitutes "control" under the Board's test is by no means simple. However, we do not reach this issue since we hold that the test itself is invalid and remand to the Board for reconsideration of "all the surrounding circumstances." On remand the Board will reevaluate the circumstances bearing on the "control" question if they are relevant to the union's objective under § 8(b)(4)(B).

Second, Simmons argues that the Board erred in failing to rule whether or not the company had a duty to bargain with the union over the work preservation issue. The union originally filed a charge against Simmons alleging an impermissible refusal to bargain, but the Regional Office and the General Counsel refused to issue a complaint. The General Counsel did state that the union could urge its charge of a refusal to bargain as a defense to Simmons' § 8(b)(4)(B) charge. In its opinion, however, the Board did not speak to the question. To the extent the events surrounding the alleged refusal to bargain are relevant to the § 8(b)(4)(B) issue, we discuss them below, *see* page 16 *infra*, and the Board may reconsider them as some of the "surrounding circumstances" on remand.

we have cut back on the test's application and questioned its basic validity.[2] Yet the Board continues to defend the test *in toto*. It takes note of our previous decision undermining the test, but states only that "[w]e respectfully disagree with the Court's decision, for the reasons set forth in our brief therein, and, accordingly, we shall not burden the Court with a restatement of those views."[3] Fortunately, intervenor J. L. Simmons Company, Inc. has taken a more responsible approach to this appeal. It seeks to save only a part of the "right to control" test by arguing that the test was properly applied on the facts of this particular case which, it says, are significantly different from those in previously reported cases.

While administrative agencies, as a general matter, deserve praise for their efforts to structure discretion under such rules, we hold that in this instance the Board has gone too far. The "right to control" test is not appropriately suited to the statutory purpose it is meant to effectuate. The peculiar facts of this case do not cause us to alter that conclusion. We are convinced that the test, applied as a *per se* rule, must be entirely abandoned forthwith. Accordingly, we remand this case to the Board for further consideration.

I

Members of Local 742 of the carpenters' and joiners' union were employed by the J. L. Simmons Company which had contracted to build a new addition to the Macon County Hospital in Illinois. One of the carpenters' duties on the project was to hang new doors. This task might have been expected to provide a good deal of work for union members, for it generally involved not simply hanging but also prior preparation—trimming, routing, mortising and cutting—of the doors. The Board adopted a

[2] *See* pages 8-9 *infra*.
[3] Brief for respondent at 9.

finding of the trial examiner that such preparatory work was "historical and traditional unit work of carpenters at the jobsite."[4] Yet in this case the carpenters were deprived of that part of the task; they were ordered by the Simmons Company to hang premachined doors, prepared at the factory rather than at the job site.

The initial decision to use premachined doors was made not by Simmons but by the Hospital Association through its architect's specifications. When Simmons originally contracted to build the hospital addition, in July of 1966, the specifications called for wooden doors to be prepared at the job site. But the contract also left the Hospital Association the option to require more expensive premachined doors should adequate financing become available. Thus by signing the contract Simmons agreed to install prefabricated doors if asked to do so. The company

[4] Trial examiner's decision at 12. At the beginning of its decision and order, the Board adopted "the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith." 178 NLRB No. 54 at 2. Yet the only finding by the examiner which appears inconsistent with the Board's brief account of the facts is that relating to the "control" issue, *see* Note 1 *supra*, which the Board concluded was dispositive of the case. The Board thus appears to have adopted, though without specific discussion, the examiner's other findings, including the one regarding traditional unit work.

Because the Board similarly adopted almost all of the examiner's findings, it might be theoretically possible for us simply to reverse its decision and order. For example, the examiner found and the Board apparently agreed that the union's sole objective was to regain traditional unit work, an objective addressed only to the labor relations of the pressured employer. Under the primary-secondary analysis mandated by the Supreme Court and set forth hereinafter, pages 11-14 *infra*, that finding would be sufficient to exonerate the union under § 8(b)(4)(B). However, we have decided to remand this case rather than flatly to reverse the Board. We believe the Board's mistaken focus confined to the question of "control" may have led it to adopt findings which it may wish to examine more thoroughly when it applies the proper primary-secondary test on remand.

thereby bound its own hands, participating affirmatively in the crucial decision. In August financing did become available and a change order was issued calling for the premachined doors.

Simmons ordered 800 premachined doors from the Anderson Wood Products Company, and three months later 80 of the doors arrived at the construction site. A Simmons vice president, "suspecting that these prefabricated doors were going to become a problem," contacted the company's attorney for advice. And a carpenters' union business agent soon thereafter did raise very strong objections to the deprivation of traditional unit work. "After being apprised of the fact that premachining was required by the specifications, [he] stated that the [union's] members employed by Simmons Company would not hang, i.e. install, the doors."[5] Somewhat more than a week later, the company's job superintendent requested that a union member begin to hang some of the doors. But the carpenter replied that there was still "a problem" about them and refused.

The union's ground for refusing to install the premachined doors was that to do so would violate its bargaining agreement with Simmons. There was, however, no specific work preservation clause in the agreement relating to the machining of doors prior to hanging.[6] Thus the

[5] 178 NLRB No. 54 at 4-5.

[6] There were two much more general, but potentially relevant, clauses in the bargaining agreement. One required Simmons to "subcontract" work according to procedures specified in Local 742's local contract with the Decatur Contractors Association; the other required Simmons to recognize the jurisdictional claims of the carpenters. However, there was no highly specific work preservation clause such as the one in *Local Union No. 636, United Assn. of Journeymen & Apprentices of Plumbing & Pipefitting Industry* v. *NLRB*, ... U.S.App.D.C. ...., ..., 430 F.2d 906, 907 (1970) ("[a]ll pipe two inches (2") and under and all hanger rods are to be cut, threaded, and installed by employees on the job").

union had to rely on an *implied* agreement to preserve work traditionally performed by the carpenters on the job site—or, at least, an implied agreement to negotiate compensation when prefabricated doors are to be installed.

After the first refusal to hang the doors, the union initiated several attempts to solve the problem through bargaining rather than litigation or continued confrontation. Its attorney got in touch with the company's attorney and suggested that the doors might be hung if the parties could negotiate a premium to be paid for the work lost. On more than one occasion this opening proposal was made, but the company gave no substantive response and proceeded to file an unfair labor practice charge against the union. Twice thereafter there were requests to hang the doors and similar refusals by the carpenters. Finally, when the company's unwillingness to negotiate a compromise solution must have been clear, the union gave in and hung all of the premachined doors in the hospital addition.

Both the trial examiner and the Board found that the union business agent's "threat" to refuse installing the premachined doors constituted restraint and coercion within Section 8(b)(4)(ii), and that the initial refusals to hang the doors constituted a "refusal in the course of * * * employment" under Section 8(b)(4)(i). However, the trial examiner found that no unfair labor practice had been committed under Section 8(b)(4). He concluded that the union had not acted with a "secondary" cease-doing-business objective violative of subsection (B). The Board reversed, finding that the carpenters' actions were indeed prohibited "secondary" pressure against Simmons. It relied *solely* on its "right to control" test. The *one* crucial factor, it said, was that Simmons had no control over the type of doors to be installed and thus over the substance of the union's grievance. In its formal opinion, the Board

considered no other factors whatever in reaching its result. It concluded that simply because "control" lay with the hospital the "Simmons Company was a neutral with respect to the assignment of this work. Hence, the pressure exerted against Simmons Company, the secondary employer, was for the purpose of forcing it to cease doing business with the Hospital and forcing the Hospital to cease doing business with Anderson Wood Products Company for the furnishing of premachined * * * doors."[7]

II

Only eight months ago, this court held in a similar case that exclusive reliance on the "right to control" test was impermissible. *Local Union No. 636, United Assn. of Journeymen & Apprentices of Plumbing & Pipefitting Industry* v. *NLRB*, ... U.S.App.D.C. ...., 430 F.2d 906 (1970). In that decision we directly followed our two other sister circuits which recently have spoken on the issue. *American Boiler Manufacturers Assn* v. *NLRB*, 8 Cir., 404 F.2d 556, 560-561 (1968); *NLRB* v. *Local Union No. 164, Int. Brotherhood of Electrical Workers*, 3 Cir., 388 F.2d 105, 109 (1968). In all of these cases, the union exerted pressure on its members' employer to regain unit work of which they had been deprived. In all of these cases, the Board had given dispositive weight to the fact that the employer was contractually bound to use prefabricated products. The only difference between this case and the previous cases is that here the union could invoke no specific work preservation clause in its agreement with the employer. The problem is whether this difference makes a difference. We conclude that it does not.

The defect of the *per se* "right to control" test is at its very core, its theoretical foundation. The test rests upon

[7] 178 NLRB No. 54 at 4-5.

a narrow, mechanical—and mistaken—conception of the primary-secondary distinction. To label an employer as a "neutral" in a labor dispute involving his own employees, the test does not look to the substance of the dispute, to its history, or to its apparent motivation. It ignores all of these factors. And, instead, it focuses solely on whether the employer is immediately capable of granting the union what it wants. If the employer is not capable of so doing, he is labelled a "neutral."

The artificiality of the test is particularly patent in cases such as this one—where the employees apparently have a grievance growing out of labor relations with their own employer (*i.e.*, loss of traditional unit work) and immediately provoked by an action of their own employer (*i.e.*, his signing of a contract which would deprive them of that work).[8] The Board does not stop to consider these aspects of the dispute. Nor does it look to see whether there may be other grievances, against other employers, which underlie the union's action. Rather, the Board seems to hold that, when an employer contracts away his power to satisfy union demands, he also contracts away his interest and involvement in the labor relations issue in dispute. He is depicted as the mere passive agent of others (*i.e.*, the party who required the prefabricated products and/or the party who manufactures them); the fact that the present dispute has its origin and its substantive focus in his ongoing labor relations with his employees is deemed irrelevant. This Cinderella-like transformation of an obviously involved party into a neutral bystander is rather incredible.

[8] This characterization of the facts of the case is based upon the findings of the trial examiner, summarily adopted by the Board. We should stress once more that, on remand, the Board is free to review its previous acceptance of such fact findings. *See* Note 4 *supra*.

The legal effect of the Board's test is to allow an employer to bind his own hands and thereby immunize himself from union pressure occasioned by his employees' loss of work. In one act, the employer helps to create a labor conflict and simultaneously wash his hands of it. The result goes far beyond the purpose of prohibiting secondary union activity: to limit the arena of economic conflict, to protect uninvolved, truly neutral parties from becoming involved in labor disputes not their own.[9] Section 8(b)(4)(B), specifically limited to secondary activity, is not an escape hatch for an obviously involved employer. Its interpretation requires a more complete and more realistic conception of involvement in a labor dispute than the Board now provides. The substance, history and motivation of a particular dispute must not be ignored.

The importance of these substantive factors to the definition of secondary union activity has been authoritatively established at least since the Supreme Court's decision in *National Woodwork Manufacturers Assn* v. *NLRB*, 386 U.S. 612 (1967).[10] That case, like this one, concerned a dispute over work preservation, although there the dispute

[9] For an extensive discussion of the "core concept" underlying the prohibition of secondary activity and the Taft-Hartley and Landrum-Griffin amendments dealing with such activity, *see National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U.S. 612, 619-644 (1967). *See generally* Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ (8)(b)(4) and 8(e)*, 113 COLUM. [sic.] L. REV. 1000 (1965); Lesnick. *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962); Note, *Secondary Boycotts and Work Preservation*, 77 YALE L. J. 1401 (1968).

[10] The *National Woodwork* approach to the primary-secondary distinction was by no means revolutionary. The approach was well established, for example, in the jurisprudence of this circuit by the mid-1960's. *See Meat & Highway Drivers, Local 710* v. *NLRB*, 118 U.S.App.D.C. 287, 335 F.2d 709 (1964); *Truck Drivers Union Local 413* v. *NLRB*, 118 U.S.App.D.C. 149, 334 F.2d 539, *cert. denied*, 379 U.S. 916 (1964); *Orange Belt District Council of Painters No. 48* v. *NLRB*, 117 U.S.App.D.C. 233, 328 F.2d 534 (1964); Note, *supra* Note 9, 77 YALE L. J. at 1405-1409.

centered on a specific work preservation clause in the bargaining agreement. The Court spoke generally to the meaning of "secondary" activity under both Section 8 (b)(4)(B) and Section 8(e). It prescribed the sort of inquiry which must be used to determine whether the pressured employer is but a neutral dragged into a dispute not his own:

> "an inquiry into whether, *under all the surrounding circumstances,* the *Union's objective* was preservation of work for [unit] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case * * * the boycotting employer would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. * * * The touchstone is whether the agreement or its maintenance is *addressed to the labor relations of the contracting employer* vis-a-vis *his own employees.* * * *"

386 U.S. at 644-645. (Footnotes omitted; emphasis added.)

The *National Woodwork* Court did not apply the above primary-secondary reasoning to the "right to control" test, since the issue had not been presented.[11] But it is quite clear that the two are in fundamental conflict. The Board's test flies in the face of *National Woodwork* in three respects: (1) It elevates one circumstance—where the immediate "control" lies—to *per se* status, rather than evaluating "all the surrounding circumstances." More than mere form is at stake here. The Supreme Court properly recognized that realistic assessment of a union's objective in a particular situation is a complex, subtle matter and must depend on a variety of evidential factors. A mechanical *per se* rule simply cannot sift and weigh the evidence with the required sensitivity. (2) A more basic

[11] The Court noted specifically that the "right to control" issue had dropped out of the case. 386 U.S. at 616 n.3.

failing of the "right to control" test under *National Woodwork* is that it focuses on entirely the wrong set of circumstances. It is concerned solely with which party presently has the power to satisfy the union's objective, rather than focusing on the substance of the objective itself.[12] Thus it misses the point of the primary-secondary distinction as set forth in *National Woodwork.* (3) And, more particularly, the Board's test fails to evaluate the substance of the union's objective by looking to see whose labor relations it is addressed to. That is the crucial matter under *National Woodwork.* If the union's grievance has to do with some third party's relations with *his* employees, the pressure it exerts against its members' employer may well be secondary.[13] But *National Woodwork* makes clear that, if the grievance has to do with the labor relations of the pressured employer with his own employees who are exerting the pressure, then the activity is probably primary and permissible under Section 8(b)(4)(B). The Supreme Court also held that an objective of preserving traditional work for the union's members with the pressured employer is definitely primary. The fact that the employer may have to cease doing business

[12] *National Woodwork* makes the union's "objective" the keystone of primary-secondary analysis. It should be clear that mere statement of the union's professed objective does not end the inquiry. When the Court spoke of "all the surrounding circumstances," it meant that the Board must concern itself also with evidence of actual motivation on the union's part, the historical origins of the dispute, and other factors filling out a realistic picture of the actual grievances animating the labor conflict in question.

[13] The paradigmatic example of secondary activity is a union's pressurizing of its members' employer to cease dealing with another party simply because the other party does not employ union labor; in that case, the union's objective is addressed strictly to the labor relations of *another* employer. There is no indication in the record of this case that the carpenter's union had any concern with the labor relations of the Hospital Association with *its* employees or of the Anderson Wood Products Company with *its* employees.

with another party to satisfy the union's demand is a permissible ancillary effect.[14] Of course, there may be cases where the union's objective is not clearly, or only partly, to preserve its members' work. But the *per se* "right to control" test would declare an activity to be secondary without any inquiry whatever into such matters.

Each of the circuit decisions, *supra,* rejecting the Board's test has found the test to be irreconcilable with the primary-secondary analysis of *National Woodwork.* In *Local Union No. 636, supra,* we stated that "the Board's application of the 'right to control' test completely ignores the teaching of the Supreme Court in *National Woodwork* * * *." .... U.S.App.D.C. at ...., 430 F.2d at 909. The above discussion in this opinion is designed to reinforce that conclusion. We concluded before that "the 'right to control' test must be abandoned." ..... U.S.App.D.C. at ...., 430 F.2d at 910. We do not retreat from that position.

Because the defect of the "right to control" test lies at its very core, the particular fact situations to which it is applied are inconsequential to its validity. It may be useful, however, to discuss briefly the extent to which the facts of this case vary from those that went before. In addition to the dispositive discussion of *National Woodwork,* our opinion in *Local Union No. 636* analyzed more narrowly the equities in the particular case. We emphasized the fact that the employer there had signed a specific

[14] The distinction between a union's objective in exerting pressure and possible ancillary effects of that pressure not a part of the objective itself is not a difficult one. *National Woodwork* holds that the union's objective must be tested by asking whose labor relations it was addressed to—not which parties may be somehow affected by it in their business dealings. Once again, we emphasize that the key is the *substance* of the union's grievance. *See* our discussion of this matter in *Local Union No. 636, supra* Note 6, ... U.S.App. D.C. at ...., 430 F.2d at 910.

work preservation clause in his labor agreement and that he could have avoided the labor conflict by respecting that agreement. His first duty, we said, was to honor a contract already signed with the union rather than to hold to a conflicting contract later signed with a third party.

This narrow line of reasoning, of course, does not precisely apply to the facts of the case now before us. There was no specific work preservation clause in the bargaining agreement here. Thus the intervenor, J. L. Simmons Company, argues that it is unfair on these facts to allow the union to exert the pressure that it did. However, continuing for the moment in the balance-of-equities framework, we may note that Simmons was by no means caught by surprise when a problem developed over installation of prefabricated doors. Indeed, the trial examiner found that a Simmons vice president anticipated the dispute and sought legal advice even before the union made its objection known. Since the preparation of doors on the job site was historical and traditional unit work, Simmons surely had notice of the impending conflict when it signed its contract with the Hospital Association.

It is true that there is no question here of honoring the letter of one contract over another, since the labor agreement was apparently silent on the work preservation issue. But is an established and fundamental principle of labor law that labor-management contracts are not to be read with narrow precision. In the words of the Supreme Court, they call "into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960). "'One cannot reduce all

the rules governing a community like an industrial plant to fifteen or even fifty pages.'" *Ibid.* "Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement." *Id.* at 580. Thus the silence of Simmons' labor agreement as to work preservation does not take that agreement out of the picture. If the "practices of the particular industry" may be read into the common law of the agreement, then the preservation of traditional unit work has substantial status under Simmons' contract with the carpenters' union.[15] Not only the Hospital Association, but also the union, had a contractual claim on Simmons. And the union's claim was the prior one.

We do not intend to hold that preservation of the door-preparation work was necessarily to be implied into the labor agreement. But we do believe that it had an important status under the agreement. If labor peace is the overriding goal of our labor laws, it seems clear that peace would have been best preserved here if Simmons, after unilaterally signing a contract which it should have known would deprive its employees of work traditionally theirs, had been willing to stop and bargain with the union over the prefabricated door issue, rather than refusing to hear of any compromise. *See Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S.

[15] We note the trial examiner's finding that prefabricated doors, such as those at issue here, had been installed only once in the area before the building of the hospital annex. It is hardly surprising that the carpenters' bargaining agreement was silent on a matter which had almost never arisen before. As new sorts of prefabrication are developed, we may expect that similar situations—of disputes arising over work preservation in the absence of specific clauses in the agreement—will become increasingly common. Employees' rights should not be lost automatically simply because new advances in technology or industry practice were not specifically foreseen.

203 (1964).[16] Even after creating the conflict, Simmons was, after all, not completely without resources to work out a solution to the dispute. Some financial compensation, for example, could have been paid to the employees in return for hanging the prefabricated doors. In the interest of labor peace, the union also would have been best advised to forego all "threats" and to stick exclusively to rational bargaining.

Finally, however, we must emphasize that this discussion of the equities of the situation is not dispositive of this case. The dispositive consideration—and the consideration which dictates the abandonment of the *per se* "right to control" test—is the process of inquiry prescribed in *National Woodwork, supra,* to govern the primary-secondary question. Neither the Board's view nor our own view of what is, broadly, fair or unfair may be put into effect using the vehicle of the Section 8(b)(4)(B) prohibition of secondary pressure. *See NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 497-498 (1960). If the presence or absence of a specific work preservation agreement is to make a difference, it can only be as one of many "surrounding circumstances" used to determine what the *"union's objective* was. It may be, for example, that when the union acts to enforce a specific clause, its objective more clearly relates to its labor relations with the primary employer. But the absence of such a specific clause is obviously not enough by itself to indicate a secondary objective relating to another

[16] As we have already noted, *supra* Note 1, there is no refusal to bargain issue in this case, as no § 8(a)(5) complaint was issued. That issue, and the applicability of *Fibreboard* to this type of fact situation, must await future litigation before the Board and in the courts. Our comments are directed only to the general balance-of-equities analysis. In that context, we find persuasive the trial examiner's "candid opinion that, if there had been more bargaining collectively and fewer unfair labor practice charges filed in the instant matter, everybody would have been better off financially—except, undoubtedly, the lawyers." Trial examiner's decision at 19.

employer. We note that the focus of *National Woodwork* is whether the union's objective was directed to the labor relations—not simply the specific contractual provisions, but the labor relations generally—of the union members' employer. There is, then, no bright line protecting employers such as the Simmons Company. Full immunization of an employer who desires to contract with a third party to install prefabricated products must be left to future bargaining agreements or future congressional mandates.

Hence we remand this case to the Board for a new decision, considering the union's objective "under all the surrounding circumstances." Of course, if it throws any light on the union's objective, the Board may consider Simmons' lack of "control" as one of those circumstances. It may also consider the absence of a specific work preservation clause to the extent that that bears on the substance of the union's objective. We emphasize once more, however, that as a *per se* rule the "right to control" test must be finally abandoned.

Remanded for further proceedings.

MacKinnon, *Circuit Judge*: I concur in the foregoing result and in the opinion, however, I wish to state my view that the mere absence of a work preservation clause in a collective bargaining agreement is not a sufficient fact to authorize the Board to completely dispose of the case by use of a *per se* "right of control" test. Further, that nothing we have said concerning the absence of a work preservation clause should be construed as indicating our opinion as to the inferences to be drawn from that fact when the Board, on remand, considers all the circumstances of the case. At that time the Board should consider all the facts and come to its own conclusion after considering all possible tests of the union's objectives.

SMITH, *District Judge, concurring specially*: I agree with Judge Wright's conclusions as to the "right to control" test and concur in the remand.

I think, however, that the Board should initially interpret the Collective Bargaining Agreement and I do not join in that part of the opinion which deals with the interpretive problems.

178 NLRB No. 54

D-1572
Decatur, Ill.

UNITED STATES OF AMERICA

BEFORE

THE NATIONAL LABOR RELATIONS BOARD

LOCAL NO. 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, JOHN FOREMAN, BUSINESS AGENT AND HAROLD STOLLEY, STEWARD

and

J. L. SIMMONS COMPANY, INC.[1]

Case 38-CC-50

DECISION AND ORDER

On July 12, 1968, Trial Examiner Thomas S. Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent Local No. 742, United Brotherhood of Carpenters and Joiners of America had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and the Charging Party filed exceptions to the Trial Examiner's Decision and briefs in support thereof, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

[1] Herein referred to as Simmons Company or the Charging Party.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision,[2] the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

On July 8, 1966, Simmons Company entered into an agreement with the Decatur and Macon County Hospital Association[3] whereby the former agreed to construct an addition to the hospital in accordance with certain specifications. This agreement was for the contractor's (Simmons Company's) base bid as modified by Alternate No. 16 and Section 35 of the specifications, which provided for the installation of wood doors "in lieu of Plastic Faced Doors." This agreement further provided that within ". . . a period of sixty days from the date of July 1, 1966, the Hospital should have the "option of reinstating work deleted by alternates. . . ."

By Contract Change Order No. 2 General, accepted by Simmons Company, the Hospital opted on August 15, 1966, for the deletion from the contract of Alternate No. 16. The consequence of this change order was to bring into effect paragraph 1.a. of Section 35 of the specifications which, as the Trial Examiner found, provided for plastic faced doors which carry a lifetime guarantee and are premachined, i.e.

[2] We specifically disavow the gratuitous and wholly unwarranted remarks of the Trial Examiner regarding members of the legal and architectural professions.

[3] Herein referred to as Hospital.

cut, routed, trimmed, and mortised at the factory.[4] Simmons ordered the required doors from Anderson Wood Products Company.

In November 1967, 80 premachined plastic faced doors arrived at the construction site. Thereafter, on December 1, 1967, Foreman, a Local 742 business agent, told Neal, Vice President and Manager of the Decatur Building Division of Simmons Company, that the premachined doors were in violation of the local area agreement.[5] After being apprised of the fact that premachining was required by the specifications, Foreman stated that the Respondent's members employed by Simmons Company would not hang, i.e. install, the doors. Respondent claimed that routing, boring, and mortising, work that the specifications required be performed by the manufacturer, belonged to the jobsite carpenters. There followed on or about December 11, 1967, and January 30 and 31, 1968, refusals to hang the doors. On these occasions Dyslin, a job superintendent for Simmons Company, asked Stolley, the union steward and Re-

[4] We find it unnecessary to the decision in this case to rule on the Trial Examiner's findings that the wood doors were not to be premachined, and that the change to plastic faced doors resulted in a $12,000 savings for Simmons Company. If it were necessary, we would find, based on the language of the specifications itself and the absence of any relevant extrinsic evidence to the contrary, that paragraph 1.c. of Section 35 of the specifications applied to both paragraph 1.a., dealing with plastic faced doors, and paragraph 1.b., dealing with wood doors, and required that the latter as well as the former be premachined. It follows that there was thus no "financial bonanza" to Simmons Company by virtue of the change from wood doors to plastic faced doors.

[5] Simmons Company at all times material here was a party to a collective-bargaining agreement with the United Brotherhood of Carpenters and Jointers of America whereby the former agreed to abide by the local area agreement between Decatur Contractors Association Inc. and Local 742. At the hearing herein Foreman stated that in his conversation with Neal he was referring to Article II of the local agreement which provides that Simmons recognize the jurisdictional claims of Respondent.

spondent's agent, to hang the doors. On all three occasions Stolley refused.

On December 11, 1967, subsequent to Stolley's refusal to hang the doors, Mamet, Respondent's attorney, suggested to Gebhard, Simmons Company's attorney, that an economic solution be worked out whereby the doors would be hung if Simmons Company negotiated an additional rate of pay for each premachined door hung. Subsequent to the filing of the unfair labor practice charge herein by Simmons Company, Corbin, a representative of Resopndent's International, proposed to Neal on January 10, 1968, that the doors would be hung but if the Respondent prevailed in the instant unfair labor practice proceeding, Simmons Company would either pay a specific premium or negotiate premium pay for hanging the premachined doors. When no substantive response to these proposals was received and after a letter from Neal dated January 31, 1968, further requesting that the doors be hung, Foreman informed Simmons Company by letter dated February 1, 1968, that Respondent would grant its members the right to install the doors. Respondents' members thereafter began installing the doors.

We find in agreement with the Trial Examiner that the above-described threat of Foreman not to hang the doors constituted restraint and coercion of Simmons Company within the meaning of Section 8(b)(4)(ii). We find in addition that the above-described refusals by union steward Stolley, also a Simmons employee, of superintendent Dyslin's requests to hang the doors constituted refusals, in the course of his employment by Simmons Company, to handle the doors or perform services within the meaning of Section 8(b)(4)(i). Contrary to the Trial Examiner, however, we find that these acts had a cease-doing-business objective violative of Subsection (B). We base this conclusion on the following reasons: The Decatur and Macon

County Hospital required in its specifications that plastic faced doors premachined by the manufacturer be installed in the addition to the hospital. While Simmons Company had a choice, subject to approval by the architect, as to the manufacturer of the doors, it had no choice as to whether or not the doors would be p. machined by the manufacturer. The Hospital was responsible for this decision and only it could change it. Simmons Company was a neutral with respect to the assignment of this work. Hence, the pressure exerted against Simmons Company, the secondary employer, was for the purpose of forcing it to cease doing business with the Hospital and forcing the Hospital to cease doing business with Anderson Wood Products Company for the furnishing of premachined plastic faced doors; this was therefore secondary action which was unlawful under Section 8(b)(4)(i) and (ii)(B).[6] We so find.[7]

The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8b)(4)(i) and (ii)(B) of the Act, we shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

---

[6] See *Local 636, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (Mechanical Contractors Association of Detroit, Inc.)* 177 NLRB No. 14; and *Pipe Fitters Local No. 120, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Mechanical Contractors Association of Cleveland)* 168 NLRB No. 138. Contrary to the Trial Examiner, in *American Boiler Manufacturers Association,* 167 NLRB No. 79, the Board indicated no propensity to abandon the right of control doctrine.

[7] In view of our findings above, we find it unnecessary to decide whether a mere demand that a contracting company bargain with a union for premium pay to perform work on prefabricated products, such as the premachined doors in the instant case, would in and of itself be violative of Section 8(b)(4)(i)(ii)(B).

Conclusions of Law

1. J. L. Simmons Company, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. J. L. Simmons Company, Inc. and Decatur and Macon County Hospital are persons within the meaning of Section 8(b)(4)(ii) of the Act.

3. Local No. 742, United Brotherhood of Carpenters and Joiners of America is a labor organization within the meaning of Section 2(5) of the Act.

4. By threatening J. L. Simmons Company, Inc. that Respondent's members employed by Simmons Company would not hang certain premachined plastic faced doors and by engaging in refusals to hang those doors, with an object of forcing Simmons Company to cease doing business with Decatur and Macon County Hospital and with Anderson Wood Products Company, Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that the Respondent, Local No. 742, United Brotherhood of Carpenters and Joiners of America, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Threatening, coercing, or restraining J. L. Simmons Company, Inc. with an object of forcing or requiring Simmons Company to cease doing business with Decatur and Macon County Hospital, Anderson Wood Products Com-

pany, or any other person with respect to premachined dcors.

(b) Engaging in a refusal in the course of employment to handle premachined plastic faced doors or to perform services for J. L. Simmons Company, Inc. with an object of forcing or requiring Simmons Company to cease doing business with Decatur and Macon County Hospital, Anderson Wood Products Company, or any other person with respect to premachined doors.

2. Take the following affirmative action which we find will effectuate the policies of the Act:

(a) Post in Respondent's business offices and meeting halls copies of the attached notice marked "Apendix."[8] Copies of said notice, on forms provided by the Regional Director for Subregion 38, after being duly signed by an official representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notice to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for Subregion 38, signed copies of the aforementioned notice for posting by J. L. Simmons Company, Inc., if it is willing, in places where notices to employees are customarily posted. Copies of said notice, on forms provided by the Regional Director, after being signed by Respondent's representative as indicated, shall be returned forthwith to the Regional Director for disposition by him.

[8] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

(c) Notify the Regional Director for Subregion 38, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C., Sep. 5, 1969.

.....
Frank W. McCulloch, Chairman

.....
John H. Fanning, Member

.....
Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE

To All Members of Local No. 742,
United Brotherhood of Carpenters and Joiners of America,
and to All Employees of J. L. Simmons Company, Inc.

PURSUANT TO

A Decision and Order of

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT
(As Amended)

we hereby nottify you that:

WE WILL NOT threaten J. L. Simmons Company, Inc. that our members will refuse to handle premachined plastic faced doors with an object of forcing or requiring Simmons Company to cease doing business with Decatur and Macon County Hospital, Anderson Wood Products Company, or any other person, with respect to premachined doors.

WE WILL NOT engage in a refusal in the course of employment to handle for J. L. Simmons Company, Inc. premachined plastic faced doors with an object of forcing or requiring Simmons Company to cease doing business with Decatur and Macon County Hospital, Anderson Wood Products Company or any other person with respect to premachined doors.

WE NOW notify our members employed by J. L. Simmons Company Inc. that we have no objection to their

hanging premachined plastic faced doors at the Decatur and Macon County Hospital addition now under construction.

LOCAL NO. 742,
UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA
(Labor Organization)

Dated .....

By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Subregional Office, 4th Floor, Citizens Building, 225 Main Street, Peoria, Illinois 61602 Telephone 309-673-9282.

TXD—400—86
Decatur, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

LOCAL NO. 742, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS
OF AMERICA, JOHN FOREMAN,
BUSINESS AGENT
AND HAROLD STOLLEY, STEWARD

and

Case
38—CC—50

J. L. SIMMONS COMPANY, INC.

William W. Cody and *Walter J. Mercer Esqs.*,
for the General Counsel.
Bernard M. Mamet, Esq., and *Mr. John Foreman*,
of Chicago, Ill., and Decatur, Illinois,
respectively, for the Respondents.
Paul G. Gebhard and *John Percesepe, Esqs.*,
of Chicago, Ill., for the Charging Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

THOMAS S. WILSON, Trial Examiner: Upon a charge duly filed on December 15, 1967, by J. L. Simmons Company, Inc., herein called the Charging Party or Simmons, the General Counsel of the National Labor Relations Board, hereinafter called the General Counsel[1] and the Board respectively, by the Regional Director for Region 38

[1] This term specifically includes the attorneys appearing for the General Counsel at the hearing.

(Peoria, Illinois), issued its complaint dated January 31, 1968, against Local No. 742, United Brotherhood of Carpenters and Joiners of America, John Foreman, Business Agent and Harold Stolley, Steward, hereinafter referred to as the Respondents, Local 742, or individually. The complaint alleged that Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Labor Management Relations Act of 1947, as amended, herein called the Act. Copies of the charge, the complaint, and notice of hearing thereon were duly served upon the Respondents and the Charging Party.

Respondents duly filed an answer admitting certain allegations of the complaint but denying the commission of any unfair labor practices.

Pursuant to notice a hearing was held at Peoria, Illinois, on April 16 and 17, 1968, before me. All parties appeared at the hearing, were represented by counsel, and afforded full opportunity to be heard, to produce, examine, and cross-examine witnesses, and to introduce evidence material and pertinent to the issues. Oral argument at the close of the hearing was waived. Briefs were received on June 3, 1968, from the Respondents, Charging Party and General Counsel.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Finding of Fact

I. Business of the Charging Party

J. L. Simmons Company, Inc., is, and has been at all times material herein, a Delaware corporation with office and place of business located at Decatur, Illinois. It is engaged in the construction business.

By the terms of an agreement entered into on July 8, 1966,

with the Board of Trustees, Decatur and Macon County Hospital Association (Hospital), Decatur, Illinois, the Charging Party is the general contractor for a project known as Additions and Alterations to Decatur and Macon County Hospital, Decatur, Illinois, which is the only project involved herein.

The complaint alleged, the answer admitted, and I find, that J. L. Simmons Company, Inc., is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Respondents

Local No. 742, United Brotherhood of Carpenters and Joiners of America is a labor organization admitting to membership employees of the Charging Party. John Foreman is its business agent and Harold Stolley is the Union's steward on the Hospital project.

III. The Alleged Unfair Labor Practices

A. *The Facts*

Sometime in the year 1965 the Board of Trustees, Decatur and Macon County Hospital Association, Decatur, Illinois, decided to enlarge its existing hospital facilities in Decatur. It had Dane D. Morgan and Associates, Architects, Burlington, Iowa, prepare plans and specifications for these additions and alterations to the existing hospital.

Due to certain problems of financing this project the architects drew these plans and specifications with a number of alternate options upon which the contractors bid.[2] In

[2] As Robert G. Neal, vice president and manager of the Decatur Building Division of J. L. Simmons Company, Inc., put it, "I remember, at the time, I had the impression, well, here is a man that's in budget trouble, he's looking for money, but he's got high-priced ideas."

other words the hospital intended to opt the cheapest "alternate" in order to keep the total price of the project down until its financing arrangements could be expanded to cover the more expensive alternates.

Section 35 of these plans and specifications, which is the root of the trouble here, became known as Alternate #16. Alternate #16 gave the Hospital the option of selecting either "plastic faced" doors or wood doors. Section 35 of the specifications read as follows:

PLASTIC FACED and WOOD DOORS

1. SCOPE

a. Unless otherwise scheduled, all doors shall be Solid Wood Core Doors with Laminated Plastic Finish as herein specified and shall be identified herein as Plastic Faced Doors.

b. See Method of Bidding. Alternates shall be taken to furnish, install, and finish Solid Wood Core Doors with Flush Wood Veneer Facings, job finished, as herein specified in lieu of Plastic Faced Doors. Flush wood veneered doors are identified herein as Wood Doors.

c. Each door to be factory fit and beveled to net opening sizes and shall be factory machined to satisfy the entire hardware schedule, except for surface applied hardware which does not require shop preparation. No cutting, routing, trimming, or mortising shall be permitted after doors leave factory and doors requiring modifications shall be returned to the factory. In general, locksets to be mortise type, hinges to be butt type, and closers to be overhead type surface applied. Most doors to have metal edge strips which shall be mortised flush with face of door. Kick plates, push plates, and bumper plates to be surface applied. A copy of an approved finish hardware schedule plus templates of hardware items will be provided by the finish hardware supplier.

d. Contractor shall verify the name of the manufacturer of plastic faced and/or wood doors prior to negotiating a contract with this sub-contractor and shall provide detailed shop drawings showing doors, sizes, mortising, and details of glazed opening for review and approval.

2. DOORS

a. All doors to be staved lumber core doors conforming to all requirements of Commercial Standards CS-171 as amended except doors with five inch stiles or rails which shall be stile and rail lumber core doors conforming to all requirements of Federal Specification LLL-D-581, Type 1, Style 11.

b. Each door to be guaranteed for the life of the building. Guarantee shall conform to the Standard One Year Door Guarantee of the National Woodwork Manufacturers Association except that the life of the guarantee shall be extended as above stated. Repair and replacement including rehanging and refinishing shall be performed at no cost to the Owner.

3. PLASTIC FACED DOORS

a. Both faces and both long edges of each door shall be covered with an approved 1/16 inch high pressure plastic laminate to meet the N.E.M.A. requirements and top and bottom edges shall be sealed with a laminated sheet plastic to minimize moisture content changes.

b. Colors and patterns of laminated plastic to be as selected by Architect.

4. WOOD DOORS

a. Face veneers and solid stock edge bands of doors located in rooms where walnut panelling is scheduled shall be premium grade plain sliced black walnut. Face veneers and solid stock edge bands of all other wood doors shall be premium grade plain sliced red oak.

b. All exposed surfaces shall be smoothly sanded and covered. Wood doors to be job finished.

5. HANDLING and PROTECTION

a. Doors shall be packaged, handled, and stored in a careful manner. They shall be protected from moisture and high humidity and shall at no time be exposed to inclement weather.

b. Each door to be numbered to correspond to its assigned opening. No job cutting, trimming, or patching will be permitted.

c. After doors are hung, they shall be finished without delay and shall be protected from damage. Doors shall not be wedged open. Upon completion of project, any door with surface defects, split faces or edges, or noticeable scratches shall be rejected and replaced at no change in contract cost.

On June 2, 1966, the bids on this project were opened and the Charging Party, Simmons, proved to be the low bidder.

On July 8, 1966, the Hospital signed a contract with Simmons whereby Simmons agreed to purchase the materials and build the additions and alterations according to specifications for a sum of $2,961,100.

As of the date of the execution of this agreement the Hospital had opted under Alternate #16 the installation of the wood doors which, according to the Simmons' bid, constituted a $12,000 saving over the use of the plastic doors. However, Anderson Wood Products Co., the supplier of the doors in either case, had agreed to supply Simmons with the specified plastic doors for only $10,000 more than the wood doors even though this Anderson bid further specified that "Wood doors under Alts. 16, 17 and 18 are not prefinished and worked for hardware." [3]

There is little question but that the Hospital at all times intended, as soon as the financing could be arranged, to

[3] Anderson read the specifications, quoted *supra*, as requiring only blank wood doors which were not prefabricated or premachined at its factory.

have the plastic doors installed rather than the wood doors because of their supposed cheaper maintenance. However, at the time of the execution of the contract, the Hospital had chosen the wood doors, thereby, according to the Simmons' bid, saving $12,000.

On August 9 and 15, 1966, Simmons held two prejob conferences with the business representatives of the various construction unions which would be involved in the project. At the second meeting Simmons presented John Foreman, president of the local Building Trades Council and also business representative of Carpenter Local 742, a copy of the inch and one-half thick plans and specifications of the project for the use of these unions. Otherwise the record shows that there was no talk about these plans and specifications for the reasons that these meetings apparently were really only "get acquainted" meetings and, besides, Gordon L. Dyslin, Simmons' job superintendent on the Hospital project, had just been employed by Simmons on August 8, and admittedly had not read the plans and specifications himself.

However, on August 15, 1966, Change Order No. 2, which increased the price of construction to $3,543,250, was accepted by both Simmons and the Hospital. Among the other changes made by this Change Order No. 2 was one involving Alternate #16 whereby the Hospital ordered the prefabricated, factory machined, lifetime guaranteed,[4] plas-

[4] Anderson's "lifetime guaranteee" read as follows:
Doors made by Anderson Wood Products Company, are clad with Formica laminated plastic, and made of the finest materials and workmanship. They are free from defects that render them unserviceable or unfit for the use for which they were intended. If properly stored, handled, installed and maintained, these doors are guaranteed against defects in materials and workmanship for the life of the installation. A warp or twist of not to exceed ¼ inch, determined by procedure No. CS 171—58 of the U.S. Dept of Commerce, shall not be considered a defect. Any door found not to meet this guarantee will be repaired or replaced without charge (including reasonable labor cost) by the manufacturer.

tic covered doors in lieu of the previously ordered wood doors. No copy of this Change Order No. 2 nor any indication thereof was ever given to the Union.

As of the time of this project, Simmons had no direct contractual relationship with Local 742 of the Carpenters' union but did have at all times material here a contract with the International United Brotherhood of Carpenters and Joiners of America by which Simmons recognized the jurisdictional claims of the United Brotherhood and agreed to observe the working conditions and wages established in the local community. The local agreement applicable here was between the Decatur Contractors' Association, Inc., and Local No. 742 and contained the following two clauses:

> Any Employer who sublets any of his work must sublet such work in accordance with the current procedural rules of the Nat'l. Joint Board in effect at the time a dispute may occur. Any Employer who sublets any of his work must sublet such work subject to the provisions concerning wages, hours and working conditions as hereinafter set forth in this contract.

Anderson Wood Products Company, the suppliers of the doors involved herein, on the other hand had a contract covering its employees with the Carpenters' Local in Louisville and its doors, whether plastic covered or wood, carried the Carpenters' union label.

With one exception labor relations on the project appear to have gone well. However, in September 1967, Carpenter Steward Harold Stolley and the other six or seven carpenters then employed on the job refused certain work because of a jurisdictional dispute with the result that Simmons discharged three of the carpenters including the steward. Respondent Union filed charges of unfair labor practices against Simmons because of these discharges. With Attorney Gebhard representing Simmons and Mamet represent-

ing Local 742, this unfair labor practice case was settled by an agreement reinstating Stolley and the other two carpenters previously discharged and providing for their "continued employment."

By the end of October, following the reinstatement of the carpenters in accordance with the settlement agreement, Respondents had reduced the number of carpenters employed at the Hospital project to two: Steward Stolley and Oestrich. The other carpenters previously employed had been transferred to other Simmons' projects.

About mid-November 1967, and several weeks before they were needed, approximately 80 of the plastic premachined doors were delivered at the Hospital project. Although the project required only about 650 such doors, it was thought as of November that some 800 doors would be required.

With one exception, the 1963 Mid-America Building project in Decatur, the doors involved here were the first plastic covered, premachined doors on any project in the jurisdiction of Local 742. On the Mid-America Building 12—20 such formica covered, premachined doors had been hung by Local 742 without objection.

Steward Stolley, having noted that these formica clad doors were factory premachined, called this matter to the attention of John Foreman, business representative of Local 742, who in turn requested the advice of Attorney Mamet. Mamet advised Foreman that "there was a Supreme Court Decision[5] upholding the position that you've got the right to refuse to install these doors and that they are bargaining unit work, and you can protect the dimunition of the bargaining unit." Mamet further advised, "Why don't you [Foreman] go in there and see if you can talk to them

[5] *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967).

[Vice President Neal of Simmons], and, particularly, since you only have 80 doors . . . why don't you tell them you'll install these 80 doors and give them an opportunity well in advance to cancel the additional 800, the balance of the 800?"

Even earlier, on November 18, Vice President Neal, suspecting that these prefabricated doors were going to become a problem, had written Simmons' attorney for advice on the matter.[6]

Acting upon Mamet's advice, on December 1, Foreman telephoned Neal requesting a meeting about 10:30 a.m. Foreman appeared at this conference accompanied by Stolley. Neal called Algie Brannon, a Simmons' job superintendent on another project, to sit in on the conference. Foreman opened the conversation by stating that he though there was a "problem" involving these doors because the mill had done work that had been done in the past exclusively by the carpenters on the jobsite. Foreman maintained that this was a violation of the local agreement. Neal got out a copy of the local agreement and asked to be shown where the violation was. Foreman stated, "It's in there, it's in there" but failed to point to any particular provision of the agreement.[7] Neal then explained that Simmons was bound by the specifications of the project and pointed to specification 35 requiring the purchase and installation of premachined formica faced and edged doors. Neal reiterated that his company "had no control" over the doors. Stolley maintained that "Doors are doors" and asked why the plastic doors installed at the Adolph Meyer Zone Center had been

[6] This letter is not in evidence because a claim of attorney-client privilege was raised and sustained at the hearing.

[7] At the hearing Foreman testified that he was referring to the clauses of the local agreement quoted, *supra*.

prepared on the site. Neal explained that in the Meyer project there were no specifications requiring premachined doors. There was some discussion of the formica faced doors used in the Commons Building at Carbondale, Illinois, which had also been fabricated on the jobsite. Neal explained that the doors at Carbondale were guaranteed only for 1 year contrary to the specifications in the Hospital project so that the Company had purchased the Carbondale doors as "blank doors" and prepared them in the field. Foreman stated that it was the Union's position that the carpenters had been deprived of the work of fitting and machining the doors on the jobsite and that, on the advice of counsel, he was informing Neal that the Union "would not hang" the formica doors for the Company or permit any other subcontractor to do so. Foreman pointed out that the doors had been prepared by mill employees who received lower wages than the carpenters on the jobsite. Prior to the conclusion of the meeting, Foreman advised Neal that, on advice of counsel, he would hang the 80 formica doors that had arrived but "it was his (Neal's) responsibility to tell the mill that was manufacturing the doors to stop doing our [Local 742] work." The meeting ended with both Neal and Foreman deciding to leave the settlement of the matter up to their respective attorneys.

The next overt move in this dispute occurred on December 11 when, on orders of Robert Neal, Job Superintendent Gordon Dyslin, accompanied by Simmons' Estimator Robert Briscoe and Carpenter Foreman Catlin, met by previous appointment with Steward Stolley and carpenter Oestrich at 12:30 p.m. in the intensive care unit where Dyslin requested Stolley and Oestrich to hang three formica clad doors on the ground that the Hospital was pressing for the completion of this unit. Stolley asked, "Didn't Mr. Neal tell you not to hang these doors?" and reminded Dyslin that there was still

"a problem" regarding these doors. Dyslin denied that Neal had told him anything about the doors and again requested the carpenters to hang the doors. Stolley refused to do so until the matter had been finally settled. Dyslin then ordered the carpenters back to the work they had been doing prior to the meeting in the intensive care unit.

Just before 5 p.m. that same day, after a long telephone call from Neal regarding the "refusal" of the carpenters to hang the prefabricated doors, Simmons' attorney, Paul Gebhard, telephoned Mamet and advised Mamet that "his boy Foreman" was refusing to hang the prefabricated Anderson doors. Mamet, acknowledging that he was the Local's attorney and had been previously advised of the problem by Foreman, asked Gebhard if he had read the *National Woodwork* case. Gebhard answered that he had but that the case was not controlling because, in the instant matter, the architectural specifications required the prefabricated plastic doors and thus deprived Simmons of "control." Mamet voiced surprise that the specifications called for premachined plastic doors saying that this was the first he knew of this but assured Gebhard that Local 742 intended no product boycott. Mamet stated that it was the policy of the Local and the International not to install precut doors so that it would do Gebhard no good to check with the International about that. Gebhard stated that he though the Respondents' position was a clear violation of law and Simmons would have to file a charge. Mamet suggested that "a possible solution could be worked out where you could go ahead and hang your doors, and yet the bargaining unit would be protected" by negotiating a rate of pay additional for each of the premachined doors hung. Gebhard answered that this "sounds to me like a payment for work not performed" because there would be no work done by any one on the jobsite. Mamet further suggestted that any such suggestion of premium pay

should be made by Gebhard to Simmons as Gebhard's own idea because of several cases Mamet had had against Simmons in the recent past. Gebhard answered that, while this didn't change his thinking, he would do some further checking on it and would "get back to Mamet" if the Company changed its position or if he heard anything different.[8]

At 5 p.m. on December 13, 1967, Simmons telephoned the following telegram addressed to John Foreman to Western Union:

> AS WE ADVISED WHEN YOU CAME TO OUR OFFICE ON DECEMBER 1ST, PURCHASE AND INSTALLATION OF FORMICA DOORS ON DECATUR AND MACON COUNTY HOSPITAL PROJECT WAS REQUIRED BY ARCHITECTS SPECIFICATIONS. WE HAD NO CONTROL OVER SPECIFICATIONS REQUIRING PURCHASE OF THESE DOORS. ON DECEMBER 11, 1967 WE REQUESTED CARPENTERS TO INSTALL THESE DOORS AND TO DATE THEY HAVE REFUSED. THEREFORE WE ARE FILING UNFAIR LABOR PRACTICE CHARGES WITH NATIONAL LABOR RELATIONS BOARD.

No doubt this telegram was delivered by the following day.

On December 15, 1967, without having "gotten back" to Mamet, Gebhard, on behalf of Simmons, filed the charge against Local 742 in the instant matter. Mamet was so notified by a telephone call from the Subregional Office in Peoria.

On December 19, 1967, Local 742, by Attorney Mamet, filed an unfair labor practice charge against Simmons claim-

[8] The above findings constitute a consensus of the testimony of Attorneys Gebhard and Mamet as to their conversation. There were several conflicts between the two, but, fortunately, none vital enough to a decision of this matter to require a credibility determination by this Trial Examiner.

ing that Simmons had violated the settlement agreement in Case 38—CA—378 by laying off employees; by subcontracting bargaining unit work without negotiating with Union; and refusing to negotiate a rate for the installation of the prefabricated doors. The Regional Office's refusal to issue a complaint upon this charge was affirmed on appeal to the General Counsel with the comment that Respondent could urge its charge of a refusal to bargain by Simmons as a defense to the complaint already issued on the Simmons' charge against Local 742.

Also on December 19, Neal received a telephone call from Duff Corbin, International representative of the Carpenters, who told Neal that he, Corbin, was aware of the urgent need to complete the intensive care unit and so he had made arrangements to have the three formica doors hung in that unit. Neal expressed his appreciation and added that Simmons, "of course, looks forward to having this complete situation resolved, so we can proceed with the hanging of all the doors." To this Corbin answered that he "felt the situation would be resolved the first of the week, which would allow us to proceed with the hanging of the doors, the balance of the doors."

Steward Stolley and Oestrich promptly thereafter hung the three prefabricated Anderson doors in the intensive care unit as had been thus agreed. None of the other prefabricated doors were hung at this time—nor was there any further request that they be hung at this time.

On January 10, 1968, International Representative Corbin, being at the Simmons' office on other business, got in touch with Robert Neal and presented him with two agreements prepared by Attorney Mamet which provided that the doors in question would be hung but that, in the event

that the Union won the case before the Board, the Carpenter employees would either be paid an additional hourly premium of a stated rate for hanging the premachined doors or the parties would thereafter negotiate the premium to be paid the employees. Neal accepted the proposed agreements and told Corbin that he would review them and pass them on to his attorneys. This was the last heard of these proposed agreements until they were introduced into evidence at the hearing.

On January 30, Gordon Dyslin, job superintendent, met Harry Stolley, carpenter steward at the project, on the south side of Hayes Street, and in the presence of Simmons' Bob Briscoe, asked Stolley if the carpenters were ready to hang the formica doors. Stolley answered in the negative, stating that the situation had not yet been straightened out. On the next day, January 31, at approximately the same time and location the previous scene was again repeated with Stolley again stating that the carpenters were not yet ready to hang the formica doors as the situation had not been straightened out yet. However at this time Dyslin gave Stolley a copy of the letter requesting the carpenters to proceed with the hanging of the doors, the original of which had been sent to Local 742.

This letter, dated January 31, 1968, read as follows:

> This letter constitutes a formal request by the J. L. Simmons Company, Inc. to the carpenters—Employees of the Simmons Company who are members of Local No. 742 of the United Brotherhood of Carpenters and Joiners of America, to proceed immediately with the work of installing on the above project the pre-cut formica clad, faced and edged doors manufactured by Anderson Wood Products Company, Louisville, Kentucky. These are the same doors that we have previously requested you to install on this project. As you

know, installation of these doors is required by the architects' specifications. The doors have been on the job site and available for installation since November, 1967.

By letter dated February 1, 1968, Local 742, over the signature of John Foreman, answered as follows:

> After receiving your registered letter of January 31, 1968, regarding the installation of Pre Cut Formica-Clad Doors at the Decatur and Macon County Hospital project. To proceed immediately with the work of installing same, I will as Business Representative of the United Brotherhood of Carpenters and Joiners Local #742 do here by grant the right of my members to install the above-mentioned product.
>
> I did try to reach you by phone and found you were out of town, so please consider this letter as formal notification.

Admittedly this was the first occasion that Foreman had instructed his members that they were free to install the premachined plastic doors.

Thereafter Stolley and Oestrich with other carpenters subsequently hired by Simmons proceeded to hang the doors in controversy. This procedure was continuing at the time of the hearing. There was no proof, however, that the delay in the hanging of the doors had delayed the completion of the project. There had been no strike or picketing over this matter.

B. *Conclusions*

It is axiomatic that, in order to prove a violation of Section 8(b)(4)(i) and (ii)(B) of the Act, it is incumbent upon General Counsel to prove that a union or its agents:

(1) Employed prohibited "means"; i.e.,

(i) "Induced or encouraged" employees to strike or refuse "to handle" any goods, or

(ii) "To threaten, coerce, or restrain" an employer;

(2) for a prohibited "object", i.e.,

(B) To force that secondary employer to cease doing business with another employer; and

(3) that said union action was not legitimate primary action.

The facts here show that both the Employer Simmons and Respondents recognized the existence of a problem between themselves over the premachined Anderson doors. While discussing this problem and, indeed, while suggesting remedies therefor to Vice President Neal and Attorney Gebhard respectively, Respondents' Business Agent Foreman and its Attorney Mamet both stated or clearly indicated that Local 742 would not hang these premachined doors because of their adverse affect on the unit work of the jobsite carpenters. Under decided Board cases these statements, although here perhaps considered considerably out of context, are technically sufficient to constitute prohibited "means" within Section 8(b)(4) of the Act. I hereby so find.

Although I make this finding here, I fear that this rule may well inhibit parties confronted with a problem of this sort from freely, openly, and frankly discussing it in ordinary day-to-day language one with the other in a bona fide effort to solve the problem. Such a rule tends to turn any earnest effort to find a peaceful solution to a problem into a game to see which one can entrap the other into an unguarded statement which might technically violate Section 8(b)(4), or some other section of the Act, so as to be able

to run to the Board and file a charge rather than to locate a peaceful solution to the problem. It seems to this Trial Examiner that many labor lawyers tend to prefer to try lawsuits than to find peaceful solutions.[9]

There is not much difference between premachined and blank doors but that difference has resulted in a great deal of trouble and much litigation. The difference referred to, of course, is the fact that the work of preparing blank doors for hanging and hardware is performed by the carpenters on the jobsite whereas, as the name implies, prefabricated or premachined doors come from the factory completely prepared for hanging and hardware thus eliminating much unit work and thereby taking money right out of the pockets of jobsite carpenters.

Regardless of the financial effect upon the jobsite carpenters, the change from blank wood doors to premachined formica doors at the Hospital project by Change Order No. 2 amounted to a financial bonanza to Simmons. In the first place the records show that Simmons charged Hospital $12,000 more for the premachined doors than for the wood doors although the premachined doors cost Simmons only $10,000 more, a clear $2,000 profit by reason of a paper change only. In the second place the fact that the formica doors were premachined whereas the wood doors were not amounted to a saving of approximately $12,000 for Simmons by reason of not having to pay the jobsite carpenters to prepare those doors for hanging and hardware.[10] There-

[9] Apparently this tendency leads to the good life for those specializing in labor relations, for Bar Association statistics indicate that labor lawyers eat "higher on the hog" than most of their brothers specializing in other fields. In my opinion this tendency does not otherwise lead to good labor relations.

[10] This $12,000 comes from not having to pay jobsite carpenters for 3 to 4 hours work per door on each of 650 doors at $5.05 per hour.

fore Change Order No. 2 to the plans and specifications for this project alone made Simmons a clear profit of $14,000 consisting of the $2,000 from the Hospital and the $12,000 savings on pay to the jobsite carpenters.

In its brief Simmons presents the following argument:

> 3. *The Union Has Not Traditionally Performed the Work Sought.* The union seeks to defend its illegal boycott by claiming that the disputed work was work it had traditionally performed. As stated above, even given a valid work preservation clause covering work that has been continuously and customarily performed by a union, attempts to enforce such a clause by means of a product boycott, where the employer does not control the disputed work, is proscribed secondary activity. Accordingly, the "traditionally performed" defense, which is essentially an 8(e) defense, has absolutely no relevance here. Nevertheless, the contention of the union herein as stated by its counsel [footnote omitted] is that the Board's "right to control doctrine" is erroneous, and further, that the union's activity here is protected because it was an attempt to preserve work which it had traditionally performed. Setting aside for the moment the clearly established precedents on the "right to control," it is obvious from the record in this case that the union has not in fact traditionally performed the work which it now seeks.
>
> There is no dispute over the fact that carpenters of Local 742 have traditionally performed the work of preparing wood doors of the type involved in the *National Woodwork* case. Nor is there any dispute over the fact that they have *not* traditionally done this work on metal doors [citation omitted]. As to formica doors involved in this case, the record is completely devoid of any evidence whatsoever that members of the Respondent union have ever prepared them to receive hardware either on or off the jobsite. In fact, the only evidence in the record on this point is to the contrary, and shows that the union has installed doors identical with those

> in dispute in the Mid-America Building (the old Labor Temple) in Decatur, Illinois [citation omitted]. Limited to the facts, the union cannot meet the requirements of the carefully articulated definition of traditional performance formulated by the Board and adopted by the Supreme Court in *National Woodwork, supra.*

In *National Woodwork,* the Board in adopting the Trial Examiner stated:

> The tasks of "cutting out and fitting" the material listed in the second sentence of rule 17 are obviously tasks which are normally performed by carpenters. The record shows that there have been occasions when millwork, including doors, came to a jobsite without having been previously cut out and fitted, that the tasks of cutting out and fitting such millwork, including doors, were considered by the contracting parties to be unit work to be performed by the jobsite carpenters, and that the carpenters on the jobsite did in fact perform those tasks on those occasions. The "will not handle" sentence was the language used in an attempt to protect and preserve this type of work for the jobsite carpenters. [149 NLRB at 656—57.]

Stewart Strolley's answer to this claim of Simmons was classic, "Doors are doors," and was also corroborated by the testimony of the most honest witness to appear at the hearing, Anderson's Sales Manager B. F. Potts, who testified that formica doors could be and were being prepared for hanging just as efficiently and well at the jobsite as at the Anderson factory. It is true that the use of formica doors at the Hospital project was in fact one of the very first occasions on which formica doors had been installed within the jurisdiction of Local 742. Some formica doors had been prepared for hanging by jobsite carpenters just outside the geographical jurisdiction of Local 742. It is also true that some few of the Anderson doors at the Hospital project required further preparation by the jobsite carpen-

ters in order for them to be properly hung. In the light of the testimony that jobsite carpenters were competent to prepare formica doors, even as they were capable of preparing wood doors, nullifies the Simmons' argument that it was not traditional work because of the formica composition of the doors in question.[11] In this case "Doors are doors," whether wood or formica. Accordingly I must, and hereby do, find that the work of preparing doors, wood or formica, for hanging and hardware, i.e., bevelling, routing, mortising, and cutting for length, is the historical and traditional unit work of carpenters at the jobsite.

The facts also prove that in their protests against and refusal to handle the premachined doors on the Hospital project, Foreman, Mamet, and Stolley all pointed out on each such occasion that the use of premachined doors eliminated or reduced the historical and customary unit work performed by the jobsite carpenters as well as taking money out of the carpenters' pockets. In addition Foreman and

[11] It is interesting to note that in *American Boiler Manufacturers Association,* 154 NLRB 285 and 154 NLRB 314, the same firm of attorneys which represents Simmons here represented the Association there and made the exact opposite contention, to wit, that the union there had "waived" its claim to unit work of piping boilers at the jobsite by having installed prepiped boilers without objection on several occasions in the past. In its brief on review after remand of the above cases, the Board had this to say regarding this contention:

> To distinguish this case from *Woodwork,* therefore, petitioner's real argument necessarily must be that a work preservation object automatically loses its primary status, and becomes an improper basis for union action, once any substantial amount of unit work is allowed to be performed elsewhere. Presumably, petitioner would require the union not only to demand a contractual protection when the first packaged boilers appear but, in addition, to strike for such a clause at that point or else lose its rights forever. Apart from the fact that such a rule would hardly be conducive to labor peace and intelligent collective bargaining, petitioner's argument is based upon a faulty view of *Woodwork.*

Mamet both offered to hang the 80 Anderson premachined doors already delivered at the jobsite if Simmons would tell Anderson to "quit doing our [unit] work." Mamet and "Duff" Corbin, International carpenter representative, offered to hang the Anderson doors if Simmons would negotiate a rate for the hanging of such premachined doors and thus take care of the loss of that unit work. The whole protest by Respondents here was against the *premachining* of the doors with its resultant loss of traditional unit work for the jobsite carpenters. Respondents throughout sought recovery of the work lost either in fact and/or through additional compensation. The Trial Examiner is fully convinced and consequently must find that the object of Respondents' protest over the use of these premachined doors was to preserve to the jobsite carpenters their traditional work of bevelling, routing, mortising, and cutting the doors to length at the jobsite. It was not a product boycott.

In addition the facts prove beyond question that Respondents had no other objection to the use of doors manufactured by Anderson provided, of course, that they were not premachined so as to eliminate the aforementioned traditional jobsite work. Consequently Respondents had no purpose or object to cause Simmons to cease doing business with Anderson. The only possible "cease doing business" angle the Respondents might have had was that Anderson should cease doing "our [unit] work" which, at best, was purely coincidental and subsidiary to the work preservation objective found above. There is in this case no showing, in the words of the Supreme Court, that the Respondents' actions here "were tactically calculated to satisfy union objectives elsewhere." The Union's objective here related solely to the relationship of Simmons vis-a-vis its jobsite carpenter employees.

Up to this point on the question of "object" the instant case is on all fours with the leading case on premachined doors, *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967), where the majority opinion holds:

III.

The determination whether the "will not handle" sentence of Rule 17 and its enforcement violated § 8(e) and § 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances,[38] the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with a boycotted employer, here the door manufacturer, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of a primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees. This will not always be a simple test to apply. But "[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task." *Local 761, Electrical Workers* v. *Labor Board*, 366 U.S. 667, 674.

[38] As a general proposition, such circumstances might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry. See Comment, 62 Mich. L. Rev. 1176, 1185 *et seq.* (1964).

> That the "will not handle" provision was not an unfair labor practice in this case is clear. The finding of the Trial Examiner, adopted by the Board, was that the objective of the sentence was preservation of work traditionally performed by the jobsite carpenters. This finding is supported by substantial evidence, and therefore the Union's making of the "will not handle" agreement was not a violation of § 8(e).
>
> Similarly, the Union's maintenance of the provision was not a violation of § 8(b)(4)(B). The Union refused to hang prefabricated doors whether or not they bore a union label, and even refused to install prefabricated doors manufactured off the jobsite by members of the Union. This and other substantial evidence supported the finding that the conduct of the Union on the Frouge jobsite related solely to preservation of the traditional tasks of the jobsite carpenters. [Citations omitted.]

Thus the *National Woodwork* case stands for the proposition that Respondents' work preservation object is legal and permissible within the meaning of Section 8(b)(4).

However, here, unlike the *National Woodwork* case, the plans and specifications, at least after Change Order No. 2 on August 15, called for the installation of life guaranteed, plastic, formica doors premachined at the factory. This gives rise to the argument that, when the plans and specifications require factory premachined doors, the project contractor has "no control" over the assignment of the work of preparing the doors for hanging and hence becomes the "neutral" secondary employer regarding the Union's work preservation demand as the assignment of that work lies elsewhere with either the owner, his architect, or the manufacturer of the doors.

Accordingly, in its brief Simmons argues:

> Thus, it is clear under all known precedent that even present a valid work preservation clause (concerning

> work that the bargaining unit has traditionally performed) an attempt to enforce such clause by a product boycott where the employer cannot control assignment of the work claimed is a violation of Section 8(b)(4)(B) of the Act. *National Woodwork, supra; accord, United Assn. Pipe Fitters Local 455 (American Boiler Manufacturers)* (3-M incident), 154 N.L.R.B. 285, 290 (1965), *enforced, American Boiler Manufacturers Association* v. *N.L.R.B.*, 366 F.2d 815 (8th Cir. 1966).[12]

As noted subsequently in the Simmons' brief, the *National Woodwork* case specifically did not decide this "Right to control" issue because, as shown in footnote 3 of that decision, the respondent union there did not see fit to appeal any part of the lower court's decision where the plans and specifications were involved. This reluctance on the part of the union there makes this Trial Examiner's job that much more difficult here.

It is true that the *American Boiler* case, cited in the brief, did in fact specifically approve the Board's "right to control" doctrine. In fact that was the only part of the Board's Order approved in that decision, the remainder of the case which the Board had dismissed was remanded to the Board with the caveat:

> Certiorari has been granted in National Woodwork Mfgrs. Assn., supra, 384 U.S. 968, 88 Sup. Ct. 1863, 16 L. Ed. 680, and helpful guidelines from the Supreme Court upon the troublesome issues here presented may reasonably be anticipated.

Simmons also argued in its brief that the Board's *National Woodwork* decision, where the Board had found that the respondent union violated Section 8(b)(4)(B) of the Act by hanging doors for an employer (Driscoll) who paid

[12] The law firm representing Simmons here also represented American Boiler Manufacturers Assn. in the cited case.

the union a royalty therefor as well as by refusing to hang the doors for an employer (McDonnell) who refused to pay that royalty was authority for the proposition that a contractor working with specifications requiring premachined doors need not bargain with the union as such actions would not be a defense to a secondary boycott charge. On this point the Board's decisions on remand in the *American Boiler* cases are of interest.

In its decisions on remand after the decision of the Supreme Court in the *National Woodwork* case, the Board reaffirmed its previous dismissals and, in addition, indicated a propensity to reverse the 3-M part of that decision, specifically cited by Simmons, if that had been possible under the terms of the remand. Regarding the 3-M part of the case, the Board held in pertinent part:

> 1. *The alleged violation of Section 8(e).* As the Board found in its original decision, the members of the fabrication committee on August 27 entered into a new *ad hoc* agreement to which Local Union No. 455, the Contractors Association and Hickey (by virtue of its membership in the Association) were parties, to the effect that the installation of the packaged boilers in this building was prohibited by the fabrication clause. We have found above that the fabrication clause was a lawful clause designed to preserve and reacquire trim-piping work traditionally performed by employees in the Contractors Association unit. To the extent that the *ad hoc* agreement had the same lawful object as the fabrication clause, it was, under the guidelines established by the Supreme Court, a primary work-preservation agreement outside the scope of Section 8(e). We note, however, that neither the Contractors Association nor any of its members, including Hickey, which contracted merely to install packaged boilers ordered by 3-M, was in a position to assign the trim-piping work at this project. Even if, in these circumstances, the Contractors Association and Hickey were regarded as

> secondary employers, and the August 27 *ad hoc* agreement as a "hot goods" agreement within the scope of Section 8(e), because these employers had no control over the assignment of the work, we would find, nevertheless, that as the trim-piping work in dispute was to be performed at the site of the construction, the August 27 agreement was protected by the construction industry proviso to Section 8(e), and was therefore lawful.

The Board then found Local 455 did not violate Section 8(b)(4)(A).

In the companion *American Boiler* case the Board's brief on review referring to the Tonka Toys incident says:

> As set forth in the counterstatement (pp. 6-7, supra), Lamb had ordered the packaged boiler for the Tonka Toys project and it was his employees who were scheduled to install the boiler.[11] After the boiler had been delivered, the Union approached Lamb and attempted to have the trim-piping removed and reattached prior to installation. There is nothing in the record which demonstrates that Lamb could not have granted this demand. Installation of the packaged boiler as delivered was, in effect, an assignment to the boiler manufacturer of work the Union claimed for Lamb's unit employees. Compare *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203. Inasmuch as the Union was attempting "to prevent the assignment of such work to employees outside the unit" [R.34], by demands upon the unit employer, the "dispute was primary" as the Board concluded. Thus Lamb was the proper target of union pressure. [Citations omitted.] It is well settled moreover that any incidental effect this primary activity might have had on any suppliers of Lamb does not render unlawful the Union's otherwise lawful conduct. [Citations omitted.]
>
> [11] Contrast Lamb's position with that of 3-M, in the St. Paul case, who had ordered the packaged boiler, but was not the employer of the unit employees seeking the trim-piping work. See pp. 6-8 of the Board's brief in the St. Paul case.

Petitioner disputes the propriety of the Board's characterization of Lamb as the primary employer [Br. 27-28]. According to Petitioner the evidence shows that although it was Lamb who *ordered* the packaged boiler, it was some unidentified architect who *specified* that a packaged boiler should be used. Consequently the argument concludes, Lamb lacked control over the disputed work and would have been deemed a neutral employer. But this argument fades before the record. The fact is that such an architect's specifications are usually accompanied by language allowing an "equivalent or approved equal" alternative to the packaged boiler [R. 270], and that a field assembled boiler would have been a fair equivalent. . . .

In these circumstances, the Union can hardly be said to have pressured the wrong employer when it approached Lamb. It was Lamb who had ordered the packaged boiler, Lamb who employed the Jobsite employees who would suffer from the loss of work, and Lamb who could remedy the Union's complaint by purchasing a conventional boiler instead.

Another incident, Pierre Aircon, in that same Board decision, 167 NLRB No. 79, is also of interest here for the Board there held:

3. *The alleged violation of Section 8(b)(4)(ii)(B).* The Board in its original decision found that the fabrication committee's requirement of reasonable compensation[13] by Pierre Aircon Company for its breach of contract constituted a peaceful method of resolving this dispute, and, therefore, Local Union No. 455 did not threaten, coerce, or restrain employers by its conduct in connection with this project within the meaning of subsection (ii) of Section 8(b)(4). We have again con-

[13] The fabrication committee required Pierre Aircon Company, on October 22, 1963, to pay $100 for violating the fabrication clause by "entering into a contract . . . with the Deluxe Check Company for the installation of a . . . boiler [which] arrived with the trim on."

sidered this matter and are of the same view. Moreover, even if the fine were considered coercive, it was directed towards Pierre Aircon, which was the primary employer as far as the record shows and was for the purpose of preserving unit work. It therefore was not prohibited by Section 8(b)(4)(B).

More recently, however, despite its decision on remand in the *American Boiler* cases, a divided Board again definitely reverted to the "right to control" doctrine with approval in *Pipe Fitters Local No. 120 (Mechanical Contractors' Association of Cleveland, Inc.)*, 168 NLRB No. 138, where the Board found the union in violation of Section 8(b)(4)(ii)(B) as regarded "cross over" piping required in the plans and specifications but not in regard to "end-pocket" piping which was not so required.

In the light of the above legal history I do not consider myself necessarily bound by the *Mechanical Contractors'* decision even though it be the Board's latest on the point so far as my research shows.

There are a few features of the instant matter which are of assistance in drawing that line "more nice than obvious":

At the time the Simmons-Hospital contract was signed on June 9, the plans and specifications for that project called for wood doors with the historical preparation thereof for hanging to be done by the carpenters at the jobsite. This situation existed at the time of the first prejob conference. The second prejob conference and the finalization of Change Order No. 2, substituting premachined doors for the wood, occurred the same day. But Local 742 received no notification of Change Order No. 2 at any time prior to the December 1 attempt by Local 742 to bargain the matter out with Simmons. Hence, until that date, Local 742 had no means of knowing that its historical unit work had been subcontracted

out by anyone to Anderson. No work preservation contract clause is required when unit work is subcontracted out. *Fibreboard Paper Products* v. *N.L.R.B.*, 379 U.S. 203. Its objection to this subcontracting was made promptly upon the discovery of the premachined doors to the immediate employer of the employees whose work was thus being lost.

Actually the facts show that the premachining of the doors as well as the so-called lifetime guarantee required by the specifications were of no importance to either Hospital or its architect. Hospital, through its manager, Perry, acknowledged that all it wanted was plastic formica doors and that there had been no discussion of either premachining or the lifetime guarantee of said doors. The architect's sole interest, as its representation admitted, was that the doors looked nice when hung.

It thus looks as though the premachining and lifetime guarantee got into the specifications because some young architectural clerk, like young law clerks, discovered some nice sounding language in other plans and specifications and decided to copy same into these plans and specifications and for no other reason.

There was nothing sacrosanct about the plans and specifications of this project. They had been changed before, as for example, Change Order No. 2. Also the specifications for the lead doors had been changed at the suggestion of the door manufacturer. Simmons could have suggested the change in specifications here without trouble.

As previously noted, neither Hospital nor its architect knew nor cared about the premachining or the lifetime guarantee. They would have had no objection to another change of the plans and specifications in this regard. Such change would also have been satisfactory to Anderson from its bid on the wood doors and from Potts' testimony which

also proved that such a change would have had no effect upon the doors. Potts also indicated that "something" could have been worked out even in regard to the lifetime guarantee.

Neither Hospital, its architect, or Anderson was even given the opportunity to reject a change in the specifications relating to the doors. Simmons, the self-proclaimed "neutral" as well as the only party with a financial stake in the matter, rejected the suggestions of Local 742 for all parties without consultation by filing the unfair labor practice charges which started the instant case.

As previously noted Change Order No. 2 resulted in a $14,000 bonanza to Simmons, an extra $2,000 over cost from the Hospital and $12,000 right out of the pockets of the employee carpenters due to the elimination of unit work already included in the Simmons contract with Hospital because in the original bid the wood doors were not to have been premachined.

Rather than to ask for a very possible change in the specifications or to bargain a new rate for hanging premachined doors as suggested by Foreman and Mamet, the attorneys for Simmons chose to file the charges here, thus eliminating entirely these possible peaceful solutions of the problem through collective bargaining.

Implicit or explicit in the suggestions of Local 742 for a peaceful solution of the problem existing over the loss or dimunition of its unit work was the change in the plans and specifications permitting the return of the traditional unit work (preparing the doors for hanging) or its equivalent (a rate for hanging premachined doors). Each of these solutions related directly to the labor relations of Simmons vis-a-vis its own carpenter employees.

Even if we accept the Board's *per se* "right to control" doctrine regarding the plans and specifications, still Sim-

mons here had control over a sum of $14,000 with which to bargain a new rate for the hanging of what Simmons here maintains to have been a new product. Thus Simmons was not without control even under that doctrine.

It was thus Simmons' refusal of the collective-bargaining principle which obstructed and prevented the reaching of a peaceful solution to the problem, whereas it was Local 742 disappointed in Simmons' rufusal to bargain which hung the premachined doors with some slight delay but without delaying the completion of the building in any way.

Thus in this case we find the use of prohibited "means" but for a legal, legitimate "object" with the Union's action in regard to both being direct primary action vis-a-vis the employer of the carpenters involved. Thus under the principles of the *National Woodwork* case, Local 742 has not violated Section 8(b)(4)(B) of the Act.

With the legal issues thus disposed of, the Trial Examiner wants to express the candid opinion that, if there had been more bargaining collectively and fewer unfair labor practice charges filed in the instant matter, everybody would have been better off financially—except, undoubtedly, the lawyers.

Accordingly, this Trial Examiner hereby recommends that the complaint in the instant matter against the Respondents here be dismissed in *toto*.

Dated at Washington, D.C. July 12, 1968.

Certified True Copy
O. W. Fields
Executive Secretary, NLRB
Date: July 12, 1968